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## TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1947

No. 87

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ORSEL MCGHEE AND MINNIE S. MCGHEE, HIS  
WIFE, PETITIONERS,

vs.

BENJAMIN J. SIPES AND ANNA C. SIPES, JAMES  
A. COON AND ADDIE A. COON, ET AL.

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE  
OF MICHIGAN

---

PETITION FOR CERTIORARI FILED MAY 10, 1947.

CERTIORARI GRANTED JUNE 23, 1947.

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 87

ORSEL MCGHEE AND MINNIE S. MCGHEE, HIS  
WIFE, PETITIONERS,

vs.

BENJAMIN J. SIPES AND ANNA C. SIPES, JAMES  
A. COON AND ADDIE A. COON, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE  
OF MICHIGAN

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[fol. 1] **IN SUPREME COURT OF MICHIGAN.**

No. 43271

**DOCKET ENTRIES**

**Parties:**

**BENJAMIN J. SIPES, et al., Plaintiffs,**

**vs.**

**ORSEL MCGHEE, et al., Defendants and Appellants**

**Plaintiffs' Attorneys: Younglove & Chockley.**

**Defendants' Attorneys: Willis M. Graves, Francis M. Dent.**

**Appeal from Wayne, In Chancery**

**Date**

**Proceedings**

**1945**

**Dec. 1. Application for leave to appeal filed.**

**Dec. 5. Stay order issued.**

**Dec. 6. Motion to dismiss and brief in opposition filed.**

**1946**

**Jan. 10. Application granted, stay continued.**

**Apr. 17. Record on appeal filed.**

**Apr. 26. Note of argument filed.**

**May 17. Motion to dismiss filed.**

**May 22. Motion to continue filed.**

**June 3. Motion to continued granted, to dismiss denied,  
no costs.**

**\*Oct. 3. Stipulation to docket filed.**

**Oct. 16. Argued in part.**

**Oct. 17. Concluded and submitted.**

**1947**

**Jan. 7. Affirmed, costs.**

**Jan. 17. Record returned to Court below.**

**Feb. 18. Motion for rehearing submitted.**

**Mar. 3. Motion for rehearing denied, costs to plaintiffs.**

**Mar. 24. Motion for stay of proceedings filed.**

**Apr. 8. Motion for stay of proceedings granted.**

[fol. 2]

## IN SUPREME COURT OF MICHIGAN

[Title omitted]

## ORDER GRANTING STAY—December 5, 1945

In this cause an application is filed for leave to appeal from the decree of the Circuit Court for the County of Wayne, in Chancery, and a motion is filed for the allowance of a stay of proceedings, and due consideration thereof having been had by the Court, it is ordered that all proceedings under the trial court's decree and order to show cause are hereby stayed pending determination of application for leave to appeal and until the further order of this Court.

## IN SUPREME COURT OF MICHIGAN

[Title omitted]

## ORDER GRANTING LEAVE TO APPEAL—January 10, 1946

In this cause an application is filed by defendants for leave to appeal from the decree of the Circuit Court for the County of Wayne, in Chancery, and a motion is filed to dismiss said application, and a brief in opposition to said application [fol. 3] having been filed by plaintiffs, and due consideration thereof having been had by the Court, it is ordered that the application be and the same is hereby granted. It is further ordered that the stay order issued herein on December 5, 1945, be and the same is hereby continued in full force and effect until the further order of this Court.

## IN SUPREME COURT OF MICHIGAN

[Title omitted]

## ORDER DENYING MOTION TO DISMISS ETC.—June 3, 1946

In this cause a motion is filed by defendants to continue the cause over the June, 1946, Term of this Court and a motion is filed by plaintiffs to dismiss the appeal heretofore taken herein by defendants, and due consideration thereof

having been had by the Court, it is ordered that the motion to dismiss be and the same is hereby denied, but without costs, and that the motion to continue be and the same is hereby granted, but without costs.

IN SUPREME COURT OF MICHIGAN

[Title omitted]

MINUTE ENTRY—October 16, 1946

[fols. 4-8] This cause coming on to be heard is argued in part.

IN SUPREME COURT OF MICHIGAN

[Title omitted]

MINUTE ENTRY—October 17, 1946

The argument heretofore commenced herein is concluded and the cause duly submitted.

[fol. 9] IN CIRCUIT COURT OF WAYNE COUNTY

CALENDAR ENTRIES

1945

- Jan. 30 Bill of complaint filed. Summons issued.
- 30 Order to show cause signed, filed.
- Feb. 2 Summons returned served, filed.
- 9 Appearance of defendants, filed.
- 16 Answer, filed.
- 21 Motion and notice to advance, filed.
- 23 Praecipe for causes ready for trial filed no. 58889.
- Mar. 1 Proof of service of motion to advance cause, notice, filed.
- 2 Order granting motion to advance cause signed, filed.
- Apr. 5 Pre-trial statement, filed.
- 7 Proof of service of pre-trial statement, filed.



1945

- 18 Fee paid. Case returned to call. Court sheet,  
Judge Guy A. Miller. \$6.00.
- 20 Transcript of testimony, filed.
- May 28 Heard by the court. Hearing in progress. Court  
sheet, Judge Miller.
- 29 Amended answer, filed.
- 29 Hearing in progress. Court sheet, Judge Miller.
- Aug. 23 Opinion of the court signed, filed.
- 24 Brief in support of motion to dismiss bill, filed.
- 24 Brief of plaintiffs, filed.
- 29 Proof of service of decree and notice of settle-  
ment, filed.
- 29 Proof of service of notice of entry of decree, filed.
- [fol. 10]
- 29 Decree signed, filed, entered. Judge Guy A.  
Miller.
- Sep. 19 Enrolled this date.
- Oct. 26 Affidavit, motion to set aside decree and notice,  
filed.
- Nov. 13 Opinion on motion for rehearing signed, filed.
- 16 Order denying rehearing and notice, filed.
- 16 Proof of service of order denying rehearing and  
notice, filed.
- 20 Notice of entry of order denying motion and  
proof of service, thereof, filed.
- 23 Motion for granting of a stay bond and a bond  
on appeal heard and denied. Court sheet,  
Judge Miller.
- 23 Motion for granting stay bond, and notice, filed.
- 27 Proof of service of claim of appeal, filed.
- 27 Claim of appeal, filed (\$5 fee paid).
- Dec. 3 Petition and order to show cause signed, filed.
- 6 Order staying proceedings, filed.

1946

- Jan. 28 Order granting leave to appeal received, filed.
- 28 Claim of appeal, filed (\$5 fee paid).
- 28 Bond to stay proceedings on appeal to Supreme  
Court, filed #71867.
- 29 Motion to extend time and notice, filed.
- 29 Order extending time signed, filed, entered.  
Judge Guy A. Miller.



1946

- Feb. 20 Motion to extend time and notice, filed.  
 20 Order extending time signed, filed, entered.  
 Judge Guy A. Miller.
- Mar. 13 Order extending time signed, filed, entered.  
 Judge Guy A. Miller.
- [fol. 11]
- Apr. 9 Record on appeal settled and certified this date.  
 Referred to Mr. Graves. Court sheet, Judge  
 Guy A. Miller.
- 9 Settled case on appeal, filed.
- 9 Notice of transmission of record on appeal to the  
 Supreme Court, filed.

[fol. 12] IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE.  
 IN CHANCERY

Hon. Guy A. Miller, Circuit Judge

Calendar No. 43271

BENJAMIN J. SIPES and ANNA C. SIPES, JAMES A. COON and  
 Addie A. Coon, et al., Plaintiffs and Appellees,

v.

ORSEL MCGHEE and MINNIE S. MCGHEE, his wife, Defendants  
 and Appellants

DEFENDANTS' REASONS AND GROUNDS OF APPEAL—Filed  
 April 9, 1946

The reasons and grounds of appeal are:

The Court erred:

1. In holding that the doctrine of reciprocal negative easement applied in this case.
2. In holding that the instruments relied on by the plaintiffs as establishing a general plan or agreement were complete as a matter of law.
3. In determining that the race of the defendants had been proved to the court.

[fol. 13] 4. In holding that the relief prayed was not directly against Section 16, Article II, and other sections of the Constitution of the State of Michigan.

5. In holding that the alleged restriction was not void for uncertainty.

6. In holding that the alleged restriction was not void as being against public policy.

7. In holding that the enforcement of the race restriction set forth in the Bill of Complaint by a court of Equity or by a decree of a court of Equity or by a decree of any Court of the State of Michigan was not violative of the Fourteenth Amendment to the Constitution of the United States of America and in that the enforcement of the decree by a court of Equity would not deny to the defendants, and each of them, equal protection of the laws of the State of Michigan, and of the United States of America, and in that it would not constitute a taking of the defendant's property without due process or any process of law.

8. In failing to hold that the general plan of developing the Subdivision had not been violated when 90% of residents on Tireman Avenue in Subdivision are Negroes.

Willis M. Graves and Francis M. Dent, Attorneys for Defendants and Appellants.

[fol. 14] IN CIRCUIT COURT OF WAYNE COUNTY

BILL OF COMPLAINT—Filed January 30, 1945

To the Circuit Court for the County of Wayne, In Chancery:

Now comes the above named plaintiffs, by Younglove and Chockley, their attorneys, filing this bill on behalf of themselves and all other owners of property in Seebaldt's Subdivision and Brooks and Kingon's Subdivision, located on Seebaldt Avenue, between Firwood and Beechwood Avenues, in the City of Detroit, Wayne County, Michigan, who

may care to join herein, and respectfully show unto the court as follows:

1. That plaintiffs, respectively, own lots in Seebaldt's Subdivision as follows:

Lot No. 53, by Benjamin J. Sipes and Anna E. Sipes, his wife;

Lot No. 68, by James A. Coon and Addie A. Coon, his wife;

Lot No. 45, by Edward F. Secunda and Anna L. Secunda, his wife;

Lot No. 49, by C. James Donovan and Elizabeth Donovan, his wife;

Lot No. 69, by William A. Kresin and Freda A. Kresin, his wife;

Lot No. 54, by Kathryn Lynn;

Lot No. 50, by Alvin C. Smith.

[fol: 15] 2. That plaintiffs, respectively, own lots in Brooks and Kingon's Subdivision as follows:

Lot No. 193, by Lora D. McMurdy;

Lot No. 196, by Herman Guse;

Lot No. 195, by August J. Becker and Anna Becker, his wife;

Lot No. 192, by Daniel J. Kuntz and Carolyn Kuntz, his wife;

Lot No. 200, by George A. Strohmer and Gertrude T. Strohmer, his wife;

Lot No. 199, by Irene L. Stofflett.

3. That all of the above described lots are located on Seebaldt Avenue, between Firwood and Beechwood Avenue, in the City of Detroit, Michigan, and are, with one or two exceptions, used and occupied by plaintiffs as their respective homes.

4. That defendants, Orsel McGhee and Minnie S. McGhee, his wife, are the owners of Lot 52 Seebaldt's Subdivision, commonly known as 4626 Seebaldt Avenue, located between Firwood and Beechwood Avenues, in the same block in which plaintiffs' homes are located.

5. That both plaintiffs' and defendants' properties above described are subject to the following restriction:

"This property shall not be used or occupied by any person or persons except those of the Caucasian race."

which restriction was signed and imposed on defendants' property by John C. Furgeson and Meda Furgeson, his wife, through whom defendants claim title, and was recorded on September 7, 1935, in Liber 4505 of Deeds, at page 610, Wayne County Register of Deeds Office.

6. That defendants Orsel McGhee and Minnie S. Mc-[fol. 16] Ghee, his wife, are not of the white or Caucasian race, but are of the colored or Negro race.

7. That said defendants, being of the Negro race and well knowing the restricted character of the neighborhood and particularly of the block on Seebaldt Avenue, between Firwood and Beechwood Avenues, have moved into and are now using and occupying the house at 4626 Seebaldt Avenue, in direct violation of said restriction limiting the use and occupancy thereof to persons of the white or Caucasian race.

8. That the restricted character of Seebaldt Avenue, and particularly of the block where defendants' property is located, as an exclusively white residential neighborhood, has been uniformly observed since the property was subdivided and the continued violation of said restriction will cause irreparable injury to these plaintiffs and all other owners in the vicinity by greatly reducing the desirability and value of their properties.

9. That defendants have been asked to abide by said restriction and to limit the use of the occupancy of their said property to persons of the Caucasian race, but have refused to do so.

10. That plaintiffs will suffer irreparable injury and damages in excess of \$1000.00 each if said violation continues and are without remedy except in a court of equity.

Wherefore, plaintiffs pray:

I. That defendants Orsel McGhee and Minnie S. McGhee, his wife, may full, true and perfect answer make to the matters herein stated and charged.



H. That a temporary injunction be issued by this Hon. [fol. 17] Court restraining defendants from using or occupying the property known as Lot No. 52 Seebaldt's Subdivision and commonly known as 4626 Seebaldt Avenue, or permitting said property to be used or occupied by any person or persons except those of the Caucasian race.

III. That upon the hearing of this cause that said temporary injunction be made permanent.

IV. That plaintiffs have such other, further or different relief as to the court shall seem just and proper.

Benjamin J. Sipes  
Anna E. Sipes  
James A. Coon  
Addie A. Coon  
Edward F. Secunda  
Anna L. Secunda  
C. James Donovan  
Elizabeth Donovan  
William A. Kresin  
Freda A. Kresin

Kathryn Lynn  
Alvin C. Smith  
Lora D. McMurdy  
Herman Guse  
August J. Becker  
Her cross. (X) Anna Becker  
Daniel J. Kuntz  
Carolyn Kuntz  
George A. Strohmer  
Gertrude T. Strohmer

Irene L. Stofflett

STATE OF MICHIGAN,  
County of Wayne—ss.

On this 29th day of January, A. D. 1945, before me, a Notary Public in and for said County, personally appeared Benjamin J. Sipes, Anna E. Sipes, James A. Coon, Addie A. Coon, Edward F. Secunda, Anna L. Secunda, C. James Donovan, Elizabeth Donovan, William A. Kresin, Freda A. Kresin, Kathryn Lynn, Alvin C. Smith, Lora D. McMurdy, Herman Guse, August J. Becker, Anna Becker, [fol. 18] Daniel J. Kuntz, Carolyn Kuntz, George A. Strohmer, Gertrude T. Strohmer and Irene L. Stofflett, to me known to be the parties above named and who made oath that they had read the foregoing bill of complaint by them subscribed, that they knew the contents thereof and that the same is true of their own knowledge, except as to matters therein stated to be upon information and belief and as to such matters they believe it to be true.

Evelyn G. McCaske, Notary Public, Wayne County,  
Michigan.

My commission expires Dec. 12, 1947.



## [fol. 19] IN CIRCUIT COURT OF WAYNE COUNTY

ANSWER TO BILL OF COMPLAINT—Filed February 16, 1945

Now come the defendants, Orsel McGhee and Minnie S. McGhee, his wife, by their attorneys, Willis M. Graves and Francis M. Dent, and saving and reserving unto themselves all manner of benefit of objection and exception to the many errors and inconsistencies in the Bill of Complaint contained, for answer thereto or such parts thereof as they are advised it is material or necessary to answer, say:

1. The defendants, not having sufficient knowledge of the allegations set forth in paragraph 1, of the Bill of Complaint, neither admit nor deny the said allegations but leave the plaintiffs to their proofs.

2. The defendants, not having sufficient knowledge of the allegations set forth in paragraph 2, of the Bill of Complaint, neither admit nor deny the said allegations but leave the plaintiffs to their proofs.

3. The defendants, not having sufficient knowledge of the allegations set forth in paragraph 3, of the Bill of Complaint, neither admit nor deny the said allegations but leave the plaintiffs to their proofs.

4. The defendants admit the ownership of Lot 52 of Seebaldt's Subdivision as alleged in paragraph 4 of the Bill of Complaint, but neither admit nor deny the remainder of said paragraph and leave the plaintiffs to their proofs.

[fol. 20] 5. The defendants deny that the restriction:

"This property shall not be used or occupied by any person or persons except those of the Caucasian race."

as alleged in paragraph 5 of the Bill of Complaint, if valid, applies to them or their use of the property owned by them.

6. The defendants say in answer to paragraph 6 of the Bill of Complaint that they do not have sufficient knowledge of their ancestry to say to which race they belong, but leave the plaintiffs to their proofs and further the defendants will demand complete and absolute proof of those allegations:

7. In answering paragraph 7, of the Bill of Complaint, the defendants say that it contains nothing but conclusions

and therefore it is not subject to affirmation or denial except the allegations of moving into the house at 4626 Seebaldt Avenue and as to that allegation, they admit the same to be true.

8. The defendants say, in answer to paragraph 8 of the Bill of Complaint, that there is no connection between the allegations of the said paragraph 8 and the allegations of paragraph 5 of the Bill of Complaint and therefore unanswerable in that form except the portion that alleges "desirability and value" and as to that portion, the defendants neither affirm nor deny but leave the plaintiffs to their proofs.

9. In answering the paragraph 9 of the Bill of Complaint, the defendants state that persons, who are not known to them visited them on more than one occasion and talked about the neighborhood and threatened them if they did not accede to some unreasonable and unconsciousable requests, [fol. 21] and they now ask that if such persons are the plaintiffs herein that they be more particularly described so that the defendants can more fully answer the said paragraph.

10. The defendants deny that any violation of any agreement or contract made by them exists and that no injury or damage is caused by them to the plaintiffs.

Further answering the plaintiffs Bill of Complaint, the defendants say that the relief therein prayed cannot be granted because:

1. The Bill of Complaint does not give the court jurisdiction to hear and determine the matters therein alleged.

2. The relief therein prayed is directly against Section 16, Article II, and other sections of the Constitution of the State of Michigan.

The defendants say that the prayers of the said Bill of Complaint ought not to be granted and the said bill should be dismissed with costs to these defendants most wrongfully sustained.

Orsel McGhee, Minnie S. McGhee.

(Signed) Willis M. Graves, Francis M. Dent, Attorneys for Defendants. Business Address: 446 East Warren Avenue, Detroit 1, Michigan.

[fol. 22] *Duly sworn to by Orsel McGhee and Minnie S. McGhee. Jurat omitted in printing.*

[fol. 23] IN CIRCUIT COURT OF WAYNE COUNTY

## PLAINTIFFS' PRE-TRIAL STATEMENT—Filed April 5, 1945

It is hereby agreed between the plaintiffs and defendants herein, as follows:

1.-Property on Seebaldt Avenue, between Firwood and Beechwood Avenue, in the City of Detroit, Wayne County, Michigan, consists of lots 36 to 71, both inclusive, of Seebaldt's Subdivision of part of Joseph Tireman's Estate, Quarter Sections 51 and 52, Ten Thousand Acre Tract and Fractional Section 3, Town 2 South, Range 11 East, according to the plat recorded in Liber 27 of Plats, page 34, and lots 188 to 205, both inclusive, of Brooks and Kingons Subdivision of part of Joseph Tireman's Estate, Quarter Sections 51 and 52, Ten Thousand Acre Tract and Fractional Section 3, Town 2 South, Range 11 East, according to the plat recorded in Liber 27 of Plats, page 32, Wayne County Records.

2. Plaintiffs own property in said block, as follows:

## In Seebaldt's Subdivision

Lot No.	Plaintiff	Deed Recorded in Liber at page	
53	Benjamin J. Sipes and wife	4148	201
68	James A. Coon and wife	2376	183
45	Edward F. Secunda and wife	5901	159
49	C. James Donovan and wife	5375	274
69	William A. Kresin and wife	1296	56
54	Kathryn Lynn	4202	321
50	Alvin C. Smith	5293	275

[fol. 24] In Brooks &amp; Kingons Subdivision

Lot No.	Plaintiff	Deed Recorded in Liber at page	
193	Lora D. McMurdy	1367	475
196	Herman Guse	4224	61
195	August J. Becker and wife	6483	168
192	Daniel J. Kuntz and wife	1563	243
200	George A. Strohmer and wife	3888	63
199	Irene L. Stofflett	4750	440

3. Defendants own and occupy property in said block described as Lot 52, Seebaldt's Subdivision, by Warranty Deed from Walter A. Joachim and Helen M. Joachim, his wife, recorded in Liber 7284, at page 135. Walter A. Joachim and wife obtained their title by Warranty Deed from John C. Ferguson and Meda Ferguson, his wife, recorded in Liber 7284, at page 137. John C. Ferguson and wife executed the restriction described below and it is recorded in Liber 4505, at page 610.

4. Instruments similar in form, reciting:

"We, the undersigned, owners of the following described property, situate and being in the City of Detroit, Wayne County, Michigan, known and described as follows, to-wit: \* \* \* for the purpose of defining, recording and carrying out the general plan of developing the subdivision which has been uniformly recognized and followed, do hereby agree that the following restriction be imposed on our property above described to remain in force until January 1st, 1960, to run with the land, and to be binding on our heirs, executors and assigns:

"This property shall not be used or occupied by any person or persons except those of the Caucasian race."

[fol. 25] It is further agreed that this restriction shall not be effective unless at least eighty per cent of the property fronting on both sides of the street in the block where above property is located is subject to this or a similar restriction."

have been executed by owners of property in said block and are recorded as follows:

Seebaldt's Subdivision

Lot	Liber	Page	Lot	Liber	Page	Lot	Liber	Page
36	4505	587	49	4505	587	61	4505	587
37	4505	587	50	4505	561	62	4505	561
38	4505	609	51	None		63	None	
39	None		52	4505	610	64	4505	587
40	None		53	4505	587	65	6190	241
41	4505	587		6040	251	66	4505	587



## Seebaldt's Subdivision—Continued

Lot	Liber	Page	Lot	Liber	Page	Lot	Liber	Page
42	4505	561	54	4505	612	67	4505	587
43	4505	561	55	4505	587	68	4505	607
44	4505	561	56	4505	587	69	4505	561
45	4505	614	57	4505	587	70	4505	613
46	4505	561	58	4505	587	71	None	
47	4505	587	59	4505	587			
48	4505	561	60	4505	608			

## Brooks &amp; Kingons Subdivision

Lot	Liber	Page	Lot	Liber	Page	Lot	Liber	Page
188	4505	606	194	4505	585	200	4505	587
189	4505	606	195	6040	248		4505	585
190	4505	611	196	4505	585	201	7350	75
191	7358	134	197	7347	480		4505	585
192	4505	585	198	4505	585	202	4505	615
193	4505	585	199	4505	587	203	4505	585
	6020	19		7350	74	204	4505	585

[fol. 26] 5. All mention herein of liber and page of the recordings of all instruments are understood to refer to the records in the office of the Register of Deeds for Wayne County, Michigan, unless the context clearly indicates otherwise. All mention of "said block" is understood to refer to the block on Seebaldt Avenue, between Firwood and Beechwood Avenue, in the City of Detroit, Wayne County, Michigan.

Younglove and Chockley, Attorneys for Defendants.

[fol. 27] IN CIRCUIT COURT OF WAYNE COUNTY

ORDER ALLOWING PLAINTIFFS' PRE-TRIAL STATEMENT TO BE  
FILED—April 4, 1945

The court is advised by Mr. Chockley, attorney for plaintiff, that a copy of the annexed pre-trial statement has been submitted to the attorneys for the defendants, and that no amendments or corrections have been proposed. Mr. Chockley has been present in court all morning and defendants' attorneys have not appeared, although Mr. Chockley called their office. It is therefore, ordered that the annexed pre-trial statement be filed.

James E. Chenot, Circuit Judge.



[fol. 28] IN CIRCUIT COURT OF WAYNE COUNTY

## DEFENDANT'S PRE-TRIAL STATEMENT

The defendants file herewith their objections to the proposed exhibits of the plaintiffs.

Defendants challenge legality of execution of following lots in accordance with Section 13284 and other sections of the Compiled Laws of the State of Michigan for the year 1929.

## In Seebaldt's Subdivision

Lot No.	Deed Recorded in Liber at Page
36 (N. 30')	4505 587
37	4505 587
41	4505 587
47	4505 587
49	4505 587
53	4505 587
56	4505 587
57	4505 587
59	4505 587
61	4505 587
66	4505 587
38 Executed by Executor without authority of Probate Court.	4505 587
68 Executed out of State and no certificate of court of record.	4505 587

[fol. 29] In Brooks and Kingon's Subdivision

Lot No.	Deed Recorded in Liber at Page
192	4505 585
193	4505 585
194	4505 585
196	4505 585
200	4505 585
203	4505 585
204	4505 585
188 and 189 executed by officers of a corporation on behalf of corporation	4505 585

All libers and pages herein mentioned are found in the office of the Register of Deeds for Wayne County.

Willis M. Graves, Francis M. Dent, Attorneys for Defendants.

Business Address: 446 East Warren Avenue, Detroit 1, Michigan.

[fol. 30] IN CIRCUIT COURT OF WAYNE COUNTY

PRE-TRIAL STATEMENT OF COURT—April 19, 1945

This is a restriction case in which the plaintiffs seek to enforce restrictions:

“This property shall not be used or occupied by any person or persons except those of the Caucasian race.”

The plaintiffs plant themselves primarily on a written restriction which includes a general plan, marked Pre-trial Exhibits 1 and 2 respectively.

Included and attached to this pre-trial statement is a list of lots covered by these agreements, the original of which are in the possession of the plaintiff and will be produced at the trial.

The defendants challenge the legality of certain of these agreements as contravening Sections 13284, 13332 to 13335, 13330 of Compiled Laws of 1929, a list of which they have submitted and is also attached to this pre-trial statement. Counsel for each side admit the correctness of the list as attached. The issue of the legality of these signatures and acknowledgments is of course an issue for the trial judge.

(Signed) I. W. Jayne, Circuit Judge.

[fol. 31] IN CIRCUIT COURT OF WAYNE COUNTY

AMENDED ANSWER TO BILL OF COMPLAINT—Filed May 29, 1945

Now come the defendants, Orsel McGhee and Minnie McGhee, his wife, by their attorneys, Willis M. Graves and Francis M. Dent, and file herewith an Amended Answer to the Bill of Complaint by adding to the general answers of the bill added paragraphs to be known as paragraphs 3, 4 and 5 of the general answer.

3. The restriction against occupancy based upon the race or color of the occupant is void under the 14th Amendment to the Federal Constitution.

4. The issuance of an injunction by this court, as prayed for, would enforce a restrictive covenant and would prevent defendants from occupying their property, because of their race or color, and would therefore contravene the 14th Amendment to the Federal Constitution.

5. The restrictive covenant, relied upon by the plaintiffs, would prevent occupancy of the property because of the race or color of the occupant, and is therefore void as against public policy.

Willis M. Graves, Francis M. Dent.

[fol. 32] IN CIRCUIT COURT OF WAYNE COUNTY

Calendar No. 371-498

**Settled Case on Appeal—Filed April 9, 1946**

Proceedings had and testimony taken in the above entitled matter before the Honorable Guy A. Miller, Circuit Judge, at Detroit, Michigan, on May 28, 1945.

**APPEARANCES:**

Mr. Lloyd Chockley, appearing on behalf of the plaintiffs.  
Messrs F. M. Dent and Willis M. Graves, appearing on behalf of the defendants.

**COLLOQUY**

Mr. Chockley: This is a suit brought by some of the property owners on Seebaldt Avenue in the City of Detroit, for the purpose of enforcing a restriction which provides that no property in this block shall be used or occupied by any person other than that of the Caucasian race. It is the claim of the plaintiffs that this restriction has been violated by the defendant, Orsel McGhee and his wife who are of the colored race, and who have purchased and moved into this property contrary to the restrictions.

[fol. 33] Mr. Dent: I have a proposed amendment. I state the proposed amendment. It is to the effect that the re-

striction in question is a violation of the Fourteenth Amendment of the Constitution of the United States. Does counsel object to that amendment?

Mr. Chockley: No, it is perfectly all right.

Mr. Dent: We will file the written amendment in answer to that effect.

Mr. Chockley: I wish to offer this Exhibit No. 1, which is the Pre-Trial Statement which I prepared and filed in this court on April 3, which is a statement of the Public Records that we rely upon and a summary or synopsis of what they contain, which has not been denied under oath and which under Third Circuit Rule No. 14-b is admissible into evidence as proof of the facts therein stated.

(Plaintiff's Exhibit No. 1 received in evidence.)

I will also offer into evidence plaintiff's Exhibits 3 and 4. These are the two papers that were called into question on the Pre-Trial and are marked Pre-Trial Exhibit 1 and Pre-Trial Exhibit 2. Those were the ones you questioned at that time.

Mr. Dent: We object to their admission into evidence. Our claim is that they cannot be admitted into evidence under the statutes of the State.

The Court: They may be received and you may state your objections, but I would like to listen to the arguments when the case is in. I will admit them and whatever objections you make—we will argue out the objection when all the questions of law can be gathered up and argued at the same time.

(Plaintiff's Exhibits No. 3 and 4 received in evidence.)

[fol. 34] Mr. Dent: We claim this might decide the entire case because the restriction says that at least eighty per cent of the property owners on each side of the street must sign these agreements, and if under our contention, eighty per cent have not signed, then, that would conclude the case. That is, they have not been signed properly. As to that Lot 68 in Seebaldt Subdivision, it was executed in the State of Indiana and there is no certificate by the clerk of the court or by the Secretary of State that the Notary Public, who executed it, had authority to execute it on that date, and under the Section recited to the court, such an instrument may not be admitted into evidence.



Mr. Chockley: My answer to that objection is contained in the Statute, Michigan Statutes Annotated, Section 26.604,, which says no such certificate is necessary.

Mr. Dent: No certificate of Notary Public as required by Statute. It should be in the form as the certificate by the County Clerk, who certifies thereto under his seal of office. That is the way the Statute reads and there is no certificate in that acknowledgment.

The Court: Well, it reads: "18 day of September, A. D. 1934, before me a Notary Public in and for said county, personally appeared James A. Coon and Addie Coon, to me known to be the same persons described in and who executed the within instrument who then severally acknowledged same to be their free act and deed. Dena P. Brickelle, Notary Public, St. Joseph County, Indiana. My commission expires 1-20-35." And impressed on it is a seal: "Notary Public, St. Joseph, County, Indiana." What should be there?

Mr. Dent: A certificate that he is a Notary Public in that county.

[fol. 35] The Court: He describes himself as a Notary Public and I don't think anything else is necessary. What are Exhibits 3 and 4?

Mr. Chockley: The Pre-Trial Exhibits that were offered on the Pre-Trial and the statement says that they should be produced and I am producing them in accordance with the agreement made at the Pre-Trial, although I don't think they are necessary to make out our case.

Mr. Dent: We have objections to those. As to Lot 38 of Seebaldt Subdivision, the restriction agreement was filed by an executor of an estate without authority from the Probate Court. We hold he had no right to do that.

The Court: I think he is right about that.

Mr. Chockley: I think he is right.

Mr. Dent: In Brooks-Kingon Subdivision, lots 188 and 189 the restriction agreement was executed by officers of a corporation—on behalf of the corporation. The acts of neither the United States Government or the State Government may put such restrictions on property. I think all the states in the country agree upon that. We claim that the state cannot create a corporation which can do something which the state itself cannot do. It was my thought that even though the people of the State of Michigan ordinarily tell the state that it may pass such resolutions, it



would still be declared unconstitutional by the Supreme Court of the United States. The state cannot go into this business under any circumstances and I don't see how they themselves, acting through any other of its authorities, that is the executive, judicial or legislative could authorize such a corporation—that is, authorizing a corporation to do such a thing.

The Court: But the Statute provides here on the "blank day of blank before me appeared AB, to me personally [fol. 36] known, by me being duly sworn did say that he is the President or other officer or agent and that the seal affixed to said instrument is the corporate seal of the said corporation that said instrument was signed and sealed in behalf of said corporation by authority of this Board of Directors and said AB acknowledged said instrument to be the free act and deed of this association." This form totally lacks the statement that these two parties are the officers and it makes no statement that the corporate seal is attached. As a matter of fact, there isn't any corporate seal attached and there lacks a statement that this is executed by authority of the Board of Directors. So, I don't think that instrument is entitled to record under our record laws. That is the ruling I am making. I don't think that instrument is notice to anyone because I don't think it is properly received for a record.

Mr. Dent: If the court will look at the instrument before it, it will see that there are a number of people who have signed and practically none of them on the same date. The acknowledgment does not state the people who appeared before him. It does not state what date and I think under these two sections that I have quoted to the court, these acknowledgments are not good. It does not show the people who appeared before him.

The Court: Well, Mr. Dent, opposite each name there is a date, for instance, February 26, 1934, and so on down the line, down to March 7, 1934, and the certificate of acknowledgment says, "Before me a Notary Public in and for said county, personally appeared each of the persons whose names are subscribed above, who respectively acknowledged that they signed same on the date appearing opposite their [fol. 37] names and severally acknowledged same to be their free act and deed." What is wrong with that?

Mr. Dent: We claim that does not comply with the Statute.

The Court: What would you have it do?

Mr. Dent: He should name the people who appeared before him in the certificate and the dates that they appeared before him in the Certificate. The certificate itself must bear a date and there is no date in the certificate.

The Court: You mean the certificate cannot refer to the dates set opposite to the names of the respective parties?

Mr. Dent: That is our contention.

The Court: On the face of the certificate that is a certificate that on the 20th day of February, 1934, Mabel S. Ball, owner of Lot 204, appeared before the Notary and executed it and acknowledged it.

SIPES, BENJAMIN J., one of the plaintiffs being first duly sworn testified as follows:

Direct examination.

By Mr. Chockley:

My name is Benjamin J. Sipes. I live at 4634 Seebaldt, and that is next door to the defendant, Mr. McGhee, and I have lived there approximately eighteen years. I own the house, and signed one of the restrictions, restricting the property against colored people. I have seen two sons and Mr. and Mrs. McGhee.

Mr. Chockley: Can you tell from looking at these people whether they are colored people or white people?

[fol. 38] Mr. Dent: If the court please, I must object to that. The only person qualified to testify as to race would be someone who is an expert in that field.

Mr. Chockley: If the court please, I don't believe that is true. I believe the man can testify in accordance with the average individual of ordinary intelligence that they can tell the difference between a white man and a negro, and I think he has a right to testify for whatever his testimony may be worth.

The Court: You may answer subject to objection.

Mr. Sipes: Colored people. During the eighteen or twenty years I lived in this house no colored people lived in this block or in the district north of Tireman and between Grand River on the east and Epworth Boulevard on the west and Joy Road on the north. If my memory serves me

correctly, I think it was in 1928 there was a doctor that moved in on Spokane—a colored doctor—and they got him out. He did not live there very long. I had talks with Mr. McGhee regarding this restriction. I presented a letter that I composed and a committee of taxpayers in the neighborhood got together and I composed this letter, and asked them if it was satisfactory to everybody concerned in this group and they said it was. We went into the house and I read the letter to Mr. McGhee.

(Whereupon, a document was marked Plaintiff's Exhibit 7 by the Reporter.)

Q. Tell us what you said to Mr. McGhee?

A. I says, "We are a group of taxpayers in the neighborhood, who are representing the Civic Association. We are a group and we are asking you to kindly vacate the property. We don't know if at the time you bought the property from [fol. 39] Larchmont to Joy Road it was restricted to the Caucasian only and we also wish to inform you that unless you vacate this—unless you move out, the Civic Association will take you to court."

Q. And what did Mr. McGhee say, if anything, in answer to that?

A. He just says, "Do you want to buy the property?" And I said, "That isn't for us to decide." He still lives there.

Cross-examination.

By Mr. Dent:

I changed my name in Probate Court on December 13, 1937, from Swipes to Sipes. I am buying the property on contract, and have been buying for approximately around eighteen years. At the time I signed this agreement I was buying on contract.

Mr. Dent: Will counsel bring in his land contract?

Mr. Chockley: I can't because he hasn't any, he has a deed, which is recorded in Liber 4148, Page 201.

Witness Continuing: There are colored and whites that live on Tireman, and at the time I signed the agreement here, colored people lived on the north side of Tireman, and they are living there now. I have seen Mr. McGhee, and he appears to have colored features. They are more darker than mine. I haven't got near enough to the man to recog-

nize his eyes. I have seen Mrs. McGhee, and she appears to be the mulatto type. Any white man to me is a Caucasian, and I haven't heard of any colored people who are Caucasians.

Mr. Dent: You are depending entirely upon this written restriction, is that true counsel?

Mr. Chockley: That is correct.

[fol. 40] Witness: I made the Mortgage to H. O. L. C., May 1, 1934.

Mr. Dent: We have a case in 298 Michigan 160.

The Court: The Court holds the mortgagor cannot decrease the title of mortgagee on property by entering into restrictive covenants like this and, therefore, as against the mortgagee that agreement is not binding and enforceable. We do not have enough facts here. Well, this agreement here, would create an encumbrance on the property which would be subsequent to and is subordinate to the bank's mortgage—the H. O. L. C. mortgage—and if that mortgage were to be foreclosed it would wipe out this agreement so far as he is concerned.

CHARLES R. ROBERT, called by plaintiffs being first duly sworn testified as follows:

Direct examination.

By Mr. Chockley:

• My name is Charles R. Robert. I live at 4311 Seebaldt, and I am in the Real Estate Business, and have been since 1915. My office is now at 7539 Grand River, between Seebaldt and Allendale. I have seen the result of influx of colored people moving into a white neighborhood. There is a depression of values to start with, general run down of the neighborhood within a short time afterwards. I have, however, seen one exception. The colored people on Scotten, south of Tireman have kept up their property pretty good and enjoyed them. As a result of this particular family moving in the people in the section are rather panic-stricken and they are willing to sell—the only thing [fol. 41] that is keeping them from throwing their stuff on the market and giving it away is the fact that they think they can get one or two colored people in there out of there. My own sales have been affected by this family. Since the



fact got around there and it seems to have gotten around the northwest section that colored people are on Seebaldt, which is one of our nicest streets, and nine out of ten calls on the telephone—that, of course, is the section I operate in—they ask which side of Grand River it is on, and the south side is where the colored people are. Six or seven weeks ago I sold a house at 5673 Seebaldt and got a deposit one day and got the owner's acceptance in the evening and before I could deliver the owner's acceptance to the purchaser, he found out there was a colored family in the district and he called me and stopped the deal, and on the request of the Securities Commission, we returned the deposit. I am familiar with Seebaldt Avenue.

Q. Are there any other colored families that live on Seebaldt other than the Defendants in this case?

A. Not to my knowledge. I specialize in the section bounded by Underwood, Colfax, Dexter, Clairmont, down to the colored section of Tireman.

Q. So far as you know are there any colored people in that section other than the Defendants?

A. So far as I know, no.

#### Cross-examination.

By Mr. Dent:

Mr. Robert: There are colored people living on the north side of Tireman, and they have lived there for the last eight or ten years.

Q. Do you know anybody living there as long ago as 1928? [fol. 42] A. I never fooled with property with colored people, and I did not pay attention, but I think that was originally laid out as business property. Tireman is a business street.

The Court: Let me ask you. Do you understand that in the subdivision in the plat as it was originally dedicated, that Tireman Avenue is designated as a business street?

The Witness: Sir, I never searched the records and I don't know what it is.

The Court: Do you know if in the original dedication there was any restriction in the plat?

The Witness: I don't know.

By Mr. Dent:

Q. Can you name any new business on the north side of Tireman between Firwood and Beechwood or along the two or three blocks there?

(Exhibit 8, plat of Brooks & Kingon's Subdivision, and Exhibit 9, plat of Seebaldt's Subdivision, received in evidence.)

A. I believe there are some businesses—not on the north side—there are some on the south side.

Q. That would be out of the subdivision?

A. That is right.

Mr. Robert: I am familiar with the property at 4626 Seebaldt, and the value of it with a colored family in it is fifty-two hundred, and if there was no colored family in it I would say sixty-eight hundred. I would say seven thousand is a fair price for that property. Very often they put on more stamps than it is required in order to get more mortgage. The mortgage evaluators very often look at the deeds to find out how much stamps were put on and pay accordingly and I know of many cases that they put on three or four dollars more.

(Deed to Orsel McGhee and wife, Exhibit 10 admitted in evidence.)

[fol. 43] By Mr. Dent:

Q. After looking at the stamps on Exhibit 10, what would that indicate?

A. That the worth was over a fraction of seven thousand dollars—

Mr. Chockley: I wish to offer into evidence exhibits 11, 12, 13, and 14, which are four additional restrictions in this block which have been obtained since this case was started. They haven't been recorded.

Mr. Dent: If the Court please, these restrictions are all dated since this case has been started—the 23rd of April, 1945, and for that reason I don't think they are proper evidence as to whether there have been any violations. There was certainly no notice to Defendants in this case.

Mr. Chockley: This restriction reads that it will be valid when eighty per cent have signed and if—which I don't think is true—and if he buys without the eighty per cent

having signed, and it subsequently becomes eighty per cent, he knows that the restriction is pending and it is subject to be made valid by the addition of some more lots or property to that restriction, and for that reason it seems to be to me a proper method of showing the restrictions that are on. Those matters are all in the record. He knows when he takes it that when eighty per cent sign, that the property is restricted.

The Court: Irrespective of whether this particular lot 52 is restricted?

Mr. Chockley: Here is the restriction on lot 52, the lot in question.

(The Court excluded Exhibits 11, 12, 13, and 14.)

Mr. Dent: May I ask off the record as to whether counsel claims this Exhibit 15, is the birth certificate of Defendant? [fol. 44] Mr. Chockley: No, this is the birth certificate of Defendant's son.

Mr. Dent: May it please the Court, we object to the introduction of this because it is not the birth certificate of any of the parties to this suit.

The Court: I am assuming, of course, that is the birth certificate of a child of these two parties.

Mr. Dent: It does not show that. The party named is Orsel McGhee. The Defendant in this case. This shows the father is Oswald McGhee—

The Court: All right, but as a matter of fact the birth certificate is made evidence only for two reasons only. By the Statute it says: "Such certified copies shall be accepted in all courts and places as prima facie evidence of the date and birth of said child." And with that statutory authority I don't think such certified copies are evidence at all. Strictly reading the statute—as I think I got to—that is evidence that a child of the parents named on the certificate was named at a certain place and at a certain time and that is all it is evidence of. The statute, Mr. Chockley, says, "Such certified copy shall be accepted as prima facie evidence of the date and place of birth of said child." That is the only purpose for which the statute make them acceptable.

Mr. Dent: The exhibit that the Court has before it, the Court will notice that the name of either Derendants of this suit, Orsel McGhee or Minnie McGhee are not on it. They are different names altogether.

Mr. Chockley: Mr. Dent, is Mr. McGhee in the court-room?

Mr. Dent: No, he is not.

Mr. Chockley: Do you expect to produce him?

Mr. Dent: At present, we don't.

The Court: While there are a lot of things on here that [fol. 45] are purely hearsay, such as, for example, the ages, the birthplace, the occupation, the number of other children and so on, it may be admitted for the purpose of showing the date and place of birth and the names of the parents, which is as far as you can stretch the statute.

(Plaintiff's Exhibit 15 admitted into evidence.)

Mr. Chockley: I will now offer Plaintiff's Exhibit 16, the affidavit for license to marry.

Mr. Dent: I think Mr. Graves would like to see it. May it please the Court, I don't know what counsel wants to prove by this— that the people in this exhibit are the Defendants in this case or not? In case that is the purpose, I don't believe that this is a proper way to prove it. I have no objection to having it admitted for what it shows on the face, but not to show that it has anything to do with the defendants in this case.

The Court: It may be received.

(Plaintiff's Exhibit 16 received in evidence.)

Mr. Chockley: That is plaintiff's case.

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DR. NORMAN D. HUMPHREY, called by Defendants being first duly sworn testified as follows:

Direct examination.

By Mr. Dent:

My name is Norman D. Humphrey. I live in the City of Detroit. I am Professor of Sociology and Anthropology at Wayne University, or Assistant Professor. I got my Bachelor of Arts degree at the University of Michigan, Master of Arts degree of Anthropology at the University of Michigan, Master of Sociology degree at the University [fol. 46] Institute of Social and Public Administration, Doctor of Philosophy degree at University of Michigan. I



have written a number of articles in the anthropological journals. I belong to the American Sociological Society and the Alpha Kappa Delta, which is a sociological society.

Mr. Dent: Mr. Chockley, would you want to ask the doctor any questions as to his qualifications as an expert in anthropology.

Mr. Chockley: I have no questions.

By Mr. Dent:

Q. In anthropology, doctor, how many races of mankind are there?

A. The most common conception is that all mankind consists of the same genesis and species, namely Homo sapiens, and within that group there are three major races and stocks, Mongoloid, Caucasoid, and Negroid.

Q. Is there any particular way that you can determine whether a man is a member of one of those three classifications?

A. There isn't any simple one, single criterion of membership.

— How do you determine the particular race of any particular person?

A. In order to approach knowing what racial derivative a person possesses, one would proceed to measure a number of known points by means of calipers and develop their relation, that is, measurements to certain averages which have been worked out and then work out from the measurements, ratios of indexes or measurement and relate those in turn into average indigenous, and he would also, probably, observe further mortal observations.

The Court: I don't follow you. You are using a lot of words that I cannot know what you mean.

The Witness: Structural features such as the eye-foid, [fol. 47] degree of freeness in the upper lid which isn't subject to measurement, but which is subject to observation. The shape of the nose and that sort of thing, which is both subject to measurement and observation.

By Mr. Dent:

Q. Professor, did you or would say that looking at an ordinary person you could tell which of the three races he belonged to?

A. Only insofar as you approach the ideal types of each of these categories.

Q. Would you say, in your opinion, the average layman could look at a person and tell what racial qualifications—or racial classification they should be put under?

A. I should say, no, because I think the average person is unfamiliar with the anthropological scientific determination of racial stocks.

The Court: That ending "oid" has the general meaning of being predominantly of the given characteristic?

The Witness: Yes, sir.

By Mr. Dent:

Q. Would you say there are any pure Caucasoid, Mongoloid or Negroids?

A. Well, it would be very difficult to say whether a person would be a pure Mongoloid, Negroid, or Caucasoid. The anthropologists assume that at one time isolated groups inbred certain physical types predominant for this particular inbred group. However, there has been shown from examinations of skeleton material from even Paleolithic have in Europe—the last Ice Age in Europe—there is evidence of admixture of the so-called Neanderthal skeletons—the Neanderthal skeletons from Palestine are deviated from the anthropology in France and Germany, and it would appear, or at least it is induced that admixture took place at this time.

Q. On the question of color, white, brown, black, or [fol. 48] yellow, would that determine necessarily whether a person was Caucasoid, Negroid, or Mongoloid?

A. No, sir, it would not determine necessarily whether he were one or the other because skin color has been shown to be a very poor index because it is not well correlated with other features.

Q. Do you know of any dark Caucasoids?

A. Yes, sir, I do.

Q. Will you give us an example of that?

A. Well, the average native of India whether he be a Moslem or a Hindu in religion.

Q. Are classified as Caucasoids?

A. Yes, sir.

Q. Do you know any light or white Negroids?

A. Yes, sir, I know of people who are called Negroids

who are light in skin coloring, and it is also a possibility for an albino to be in any one of the several racial groups.

### Cross-examination.

By Mr. Chockley:

Q. Doctor, the approach that you have testified to here, has been the purely scientific and academic approach, has it not?

A. It has been the scientific and academic approach, yes, sir.

Q. In other words, you are not testifying to the popular concepts of these things, you are testifying solely as to the academic concepts?

A. Yes, sir.

Q. In just ordinary language that the man in the street uses, what does the Negroid consist of? What is the common word for that?

[fol. 49] A. The average person in the street calls it "nigger" and spells it with two "g's".

Q. What is the Mongoloid? What is the term for that?

A. Again, the man in the street uses variable language—He may use Mongolian.

Q. And the Caucasoid, what is the common word for that?

A. Well, the commonly used term is the white race, so to speak, but actually there is a variance here between the man in the streets usage of the term and the anthropologists', just as there is a difference between the chemist—

Q. I understand, but I am talking about common, ordinary meaning of the man on the street—the Negroids are known as the black race?

A. That is right, but I am not competent to talk about the language of the man on the street because it is an ambiguous language.

Q. I grant you that, but generally speaking, the Negroid is the black race?

A. It is commonly felt that Negroids are black.

Q. Isn't it a fact that they are commonly called black?

A. Commonly—to me they would be more brown than black.

Q. Or black or brown; but the Mongolians or Mongoloids are talked of by the ordinary people as a yellow race?

A. In some references, yes, and in some references, no.

Q. They are talked about commonly in ordinary language as the "Yellow Race", isn't that so?

A. Yes, sir.

Q. And the Caucasoid is what is commonly considered to be the white race?

A. Yes, sir.

[fol. 50] MELVIN TUMIN, called by Defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Dent:

My name is Melvin Tumin. I am a resident of the City of Detroit and an instructor of Sociology and Anthropology at Wayne University. I had my B.A., at Wisconsin, my M.A. at the University of Wisconsin and my Ph.D., at Northwestern in Sociology and Anthropology.

By Mr. Dent:

Q. Doctor, you have heard the testimony of Dr. Humphrey, do you agree with his testimony?

A. Yes, sir.

Q. Is there any place that you disagree with his testimony?

A. I can't think of any substantial disagreements.

Mr. Dent: That is the defendants' case. The defense rests.



[fol. 51]

## EXHIBIT 1

Plaintiffs' Pre-Trial Statement—Filed April 4, 1945

STATE OF MICHIGAN,

In the Circuit Court for the County of Wayne, In  
Chancery.

No. 371,498

BENJAMIN J. SIPES, et al., Plaintiffs,

vs.

ORSEL MCGHEE, et al., Defendants

It is hereby agreed between the plaintiffs and defendants herein, as follows:

1. Property on Seebaldt Avenue, between Firwood and Beechwood Avenue, in the City of Detroit, Wayne County, Michigan, consists of lots 36 to 71, both inclusive, of Seebaldt's Subdivision of part of Joseph Tireman's Estate, Quarter Sections 51 and 52, Ten Thousand Acre Tract and Fractional Section 3, Town 2 South, Range 11 East, according to the plat recorded in Liber 27 of Plats, page 34, and lots 188 to 205, both inclusive, of Brooks and Kingons Subdivision of part of Joseph Tireman's Estate, Quarter Sections 51, and 52, Ten Thousand Acre Tract and Fractional Section 3, Town 2 South Range 11 East, according to the plat recorded in Liber 27 of Plats, page 32, Wayne County Records.

2. Plaintiffs own property in said block, as follows:

[fol. 52]

In Seebaldt's Subdivision

Dot No.	Plaintiff	Deed Recorded in Liber at page	
53	Benjamin J. Sipes and wife	4148	201
68	James A. Coon and wife	2376	183
45	Edward F. Secunda and wife	5901	159
49	C. James Donovan and wife	5375	274
69	William A. Kresin and wife	1296	56
54	Kathryn Lynn	4202	321
50	Alvin C. Smith	5293	275

## In Brooks &amp; Kingons Subdivision

Lot No.	Plaintiff	Deed Recorded in Liber at page	
193	Lora D. McMurdy	1367	475
196	Herman Guse	4224	61
195	August J. Becker and wife	6483	168
192	Daniel J. Kuntz and wife	1563	243
200	George A. Strohmer and wife	3888	63
199	Irene L. Stofflett	4750	440

3. Defendants own and occupy property in said block described as Lot 52, Seebaldt's Subdivision, by Warranty Deed from Walter A. Joachim and Helen M. Joachim, his wife, recorded in Liber 7284, at page 135. Walter A. Joachim and wife obtained their title by Warranty Deed from John C. Ferguson and Meda Ferguson, his wife, recorded in Liber 7284, at page 137. John C. Ferguson and wife executed the restriction described below and it is recorded in Liber 4505, at page 610.

4. Instruments similar in form, reciting:

"We, the undersigned, owners of the following described property, situate and being in the City of Detroit, Wayne County, Michigan, known and described [fol. 53] as follows, to-wit: . . . for the purpose of defining, recording and carrying out the general plan of developing the subdivision which has been uniformly recognized and followed, do hereby agree that the following restriction be imposed on our property above described to remain in force until January 1st, 1960; to run with the land, and to be binding on our heirs, executors and assigns:

"This property shall not be used or occupied by any person or persons except those of the Caucasian race."

It is further agreed that this restriction shall not be effective unless at least eighty per cent of the property fronting on both sides of the street in the block where above property is located is subject to this or a similar restriction."

have been executed by owners of property in said block and are recorded as follows:

### Seebaldt's Subdivision

Lot	Liber	Page	Lot	Liber	Page	Lot	Liber	Page
36	4505	587	49	4505	587	61	4505	587
37	4505	587	50	4505	561	62	4505	561
38	4505	609	51	None		63	None	
39	None		52	4505	610	64	4505	587
40	None		53	4505	587	65	6190	241
41	4505	587		6040	251	66	4505	587
42	4505	561	54	4505	612	67	4505	587
43	4505	561	55	4505	587	68	4505	607
44	4505	561	56	4505	587	69	4505	561
45	4505	614	57	4505	587	70	4505	613
46	4505	561	58	4505	587	71	None	
47	4505	587	59	4505	587			
48	4505	561	60	4505	608			

[fol. 54]

### Brooks & Kingons Subdivision

Lot	Liber	Page	Lot	Liber	Page	Lot	Liber	Page
188	4505	606	194	4505	585	200	4505	587
189	4505	606	195	6040	248		4505	585
190	4505	611	196	4505	585	201	7350	75
191	7358	134	197	7347	480		4505	585
192	4505	585	198	4505	585	202	4505	615
193	4505	585	199	4505	587	203	4505	585
	6020	19		7350	74	240	4505	585

5. All mention herein of liber and page of the recordings of all instruments are understood to refer to the records in the office of the Register of Deeds for Wayne County, Michigan, unless the context clearly indicates otherwise. All mention of "said block" is understood to refer to the block on Seebaldt Avenue, between Firwood and Beechwood Avenue, in the City of Detroit, Wayne County, Michigan.

Younglove and Chockley, Attorneys for Defendants.

[fol. 55]

## EXHIBIT 2

## DEFENDANTS' PRE-TRIAL STATEMENT

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE, STATE OF  
MICHIGAN, IN CHANCERY.

Calendar No. 371,498

BENJAMIN J. SIPES, et al., Plaintiffs,

v.

ORSEL MCGHEE, et al., Defendants

The defendants file herewith their objections to the proposed exhibits of the plaintiffs.

Defendants challenge legality of execution of following lots in accordance with Section 13284 and other sections of the Compiled Laws of the State of Michigan for the year 1929.

In Seebaldt's Subdivision

Lot No.	Deed Recorded in Liber at Page	
36 (N: 30')	4505	587
37	4505	587
41	4505	587
47	4505	587
49	4505	587
[fol. 56]		
53	4505	587
56	4505	587
57	4505	587
59	4505	587
61	4505	587
66	4505	587
38	4505	587
68	4505	587
Executed by Executor without authority of Probate Court		
Executed out of State and no certificate of court of record		



## In Brooks and Kingon's Subdivision

Lot No.

Deed recorded in  
Liber at Page.

192

4505 585

193

4505 585

194

4505 585

196

4505 585

200

4505 585

203

4505 585

204

4505 585

188

4505 585

and 189 executed by officers of  
a corporation on behalf of  
corporation

[fol. 57] All libers and pages herein mentioned are found  
in the office of the Register of Deeds for Wayne County.

Willis M. Graves, Francis M. Dent, Attorneys for  
Defendants.

Business Address: 446 East Warren Avenue, Detroit 1,  
Michigan.

✓ Exhibits 3 and 4

11527 4505 585

SEP 7 1928 11<sup>12</sup> PM

HAROLD E. STOLL, REGISTER

To, the undersigned, owners of property in the following subdivision:

Brooks and Kings Sub. of part of  
Joseph Tinsars 1st. 1/4 Secs. 3, 4  
S4 100CC A. T. and T1 Sec. 3,  
T 8 S R 11 E.

for the purpose of defining, recording and carrying out the general plan of developing the subdivision which has been uniformly recognized and followed, we hereby agree with each other that the following restriction be imposed on our property in said subdivision, to remain in force until January 1st, 1930, to run with the land and to be binding on our heirs, executors and assigns:

"This property shall not be used or occupied by any person or persons except those of the Caucasian race".

It is further agreed that this restriction shall not be effective unless at least eighty percent of the property fronting on both sides of the street in the block where our land is located is subjected to this or a similar restriction.

IN WITNESS WHEREOF we have hereunto signed our names on the date following our respective signatures.

Signature	Lot No.	Date
<u>James Richard</u>	<u>192</u>	<u>Feb 1928</u>
<u>William E. Smith</u>	<u>191</u>	<u>Feb 1928</u>
<u>William E. Smith</u>	<u>191</u>	<u>Feb 1928</u>

INDEXED

## Exhibits 3 and 4

(Continued)

REV 4505 REG 586

## Additional Grant

Agreement regarding restriction on Branks and Kings Sub-  
that

"This property shall not be used or occupied by any person or  
persons except those of the Caucasian race".

NAME	LOT P.L.	DATE
<u>Daniel J. Hunt</u>	<u>192</u>	<u>2/20/34</u>
<u>Carlynn F. Hunt</u>	<u>192</u>	<u>2/20/34</u>
<u>Mabel E. Ball</u>	<u>204</u>	<u>2/21/34</u>
<u>Lyle G. Parnett</u>	<u>203</u>	<u>2/20/34</u>
<u>Elizabeth A. Parnett</u>	<u>203</u>	<u>2/20/34</u>
<u>Lucia L. Lindner</u>	<u>194</u>	<u>2/20/34</u>
<u>Lora D. McWhorter</u>	<u>193</u>	<u>2-21-34</u>
<u>George A. McWhorter</u>	<u>193</u>	<u>2-21-34</u>
<u>Hermann J. Lee</u>	<u>96</u>	<u>2-21-34</u>
<u>William J. Lee</u>	<u>96</u>	<u>2-21-34</u>
<u>George T. Strohmeyer</u>	<u>200</u>	<u>3-6-34</u>
<u>Gertrude T. Strohmeyer</u>	<u>200</u>	<u>3-19-34</u>
<u>W. B. L. Stacey</u>		<u>3-7-34</u>
<u>Thomas H. Stacey</u>		<u>3-7-34</u>

State of Mich.  
County of Washtenaw

I, the undersigned, a Notary Public, in and for said county, personally appeared each of the persons whose  
names are subscribed above, who respectively acknowledge that they signed the same on the date and  
month their names and who personally acknowledge the same to be their free and voluntary act.

Notary Public - Washtenaw County - Mich.  
Commission expires Jan. 10, 1937.

AFFIDAVIT SEE REG. NO. C-816276 UNDER 7356 PAGE 75  
FOR AFFIDAVIT SEE REG. NO. C-816277 UNDER 7350 PAGE 74

**Exhibits 3 and 4**

(Continued)

3<sup>rd</sup> York on Subalt (found part way to  
EAST SLIP 7 1938 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100 101 102 103 104 105 106 107 108 109 110 111 112 113 114 115 116 117 118 119 120 121 122 123 124 125 126 127 128 129 130 131 132 133 134 135 136 137 138 139 140 141 142 143 144 145 146 147 148 149 150 151 152 153 154 155 156 157 158 159 160 161 162 163 164 165 166 167 168 169 170 171 172 173 174 175 176 177 178 179 180 181 182 183 184 185 186 187 188 189 190 191 192 193 194 195 196 197 198 199 200 201 202 203 204 205 206 207 208 209 210 211 212 213 214 215 216 217 218 219 220 221 222 223 224 225 226 227 228 229 230 231 232 233 234 235 236 237 238 239 240 241 242 243 244 245 246 247 248 249 250 251 252 253 254 255 256 257 258 259 260 261 262 263 264 265 266 267 268 269 270 271 272 273 274 275 276 277 278 279 280 281 282 283 284 285 286 287 288 289 290 291 292 293 294 295 296 297 298 299 300 301 302 303 304 305 306 307 308 309 310 311 312 313 314 315 316 317 318 319 320 321 322 323 324 325 326 327 328 329 330 331 332 333 334 335 336 337 338 339 340 341 342 343 344 345 346 347 348 349 350 351 352 353 354 355 356 357 358 359 360 361 362 363 364 365 366 367 368 369 370 371 372 373 374 375 376 377 378 379 380 381 382 383 384 385 386 387 388 389 390 391 392 393 394 395 396 397 398 399 400 401 402 403 404 405 406 407 408 409 410 411 412 413 414 415 416 417 418 419 420 421 422 423 424 425 426 427 428 429 430 431 432 433 434 435 436 437 438 439 440 441 442 443 444 445 446 447 448 449 450 451 452 453 454 455 456 457 458 459 460 461 462 463 464 465 466 467 468 469 470 471 4

We, the undersigned, owners of property in the following subdivisions:

WALL M: 34 CAP M: 30  
 Building Sub. of, part of 1st - 1st - 1st  
 N. 1st. No. 11 & 12 (1st & 2nd) - 1st - 1st  
 1st - 1st - 1st - 1st - 1st

for the purpose of defining, recording and carrying out the general plan of development and subdivision which has been uniformly recognized and followed, do hereby agree with each other that the following restriction be imposed on our property in said subdivision, to remain in force until January 1st, 1960, to run with the land and to be binding on our heirs, executors and assigns:

"This property shall not be used or occupied by any person  
except those of the Caucasian race."

It is further agreed that this restriction shall not be effective unless at least eighty percent of the property fronting on both sides of the street in the block where our land is located is subjected to this or a similar restriction.

IN WITNESS WHEREOF we have hereunto signed our names on the date following our respective signatures.

Name	LC No.	Date
<del>John A. [illegible]</del>	<del>55</del>	<del>5-24-1934</del>
<del>Robert [illegible]</del>	<del>55</del>	<del>5-24-1934</del>



Exhibits 3 and 4

(Continued)

Jan 4505' 588

## ADDITIONAL GRANT

Agreement regarding restriction on Seebaldt Subdivision.that of Mrs. Joseph Brown's Tr. 2 Sec. 51 - 52 10.00 A. T.  
and Tr. 1 Sec. 51, 52 3.2.112."This property shall not be used or occupied by any person of  
persons except those of the Caucasian race".

NAME	AGE	DATE
Mr. Fred M. Henry	56	2/26/34
Ed. Pearson	41	5/21/34
Harry Berman	41	2/2 - 35
Edward C. Kehl	49	2/21/34
James C. Kehl	40	3/1/34
Ethel Pearson	51	5/1/34
Hubert Kline	47	May 18 <sup>th</sup> 34
Harry Kline	47	May 18 <sup>th</sup> 34
Cesar A. Seebaldt	57	May 18 <sup>th</sup> 34
Pauline C. Seebaldt	57	May 18 <sup>th</sup> 34
Emma C. Seebaldt	61	May 26 <sup>th</sup> 34
Ed. Kline	66	July 31, 1934
Harold Kline	66	July 31, 1934
Benjamin J. Seebaldt	53	Sept. 28, 1934
Anna L. Seebaldt	53	Sept. 28, 1934

## Exhibit 3 and 4

(Continued)

AC. (containing) ...

that

"This property shall not be used by any person or persons except those of the ..."

NAME	LOT NO.	DATE
Charles E. ...	...	...
...	...	...
...	...	...
...	...	...
...	...	...
...	...	...

State of ...  
County of ...

Witness my hand and seal this ... day of ... 19...

Notary Public for the State of ...  
My commission expires July 10, 19...

Exhibits 3 and 4

(Continued)

LES 4505, 610, 11/16, 11/16, 11/16

HAROLD E. STOLL, Register  
We, the undersigned, owners of the following described property:

1/2 Section 26 Sub. of Part of  
Joseph Township, 1/4 Sec. 21 & 22  
1/4 Sec. 23 and 24 Sec. 2, T 2 S, R 11 E.

for the purpose of defining, recording, and carrying out the general plan of development in the subdivision which has been uniformly recognized and followed, do hereby agree that the following restriction be imposed on our property above described, to remain in force until January 1st, 1930 - to run with the land, and to be binding on our heirs, executors, and assigns:

"This property shall not be used or occupied by any person or persons except those of the Caucasian race."

It is further agreed that this restriction shall not be effective unless at least eighty percent of the property fronting on both sides of the street in the block where our land is located is subjected to this or a similar restriction.

IN WITNESS WHEREOF we have hereunto set our hands and seals this 20th day of March, A. D. 1934.

Signed, sealed, and delivered in presence of:

W. John C. Ferguson  
W. John C. Ferguson

W. Charles E. Ferguson

STATE OF Michigan

COUNTY OF Alcona

On this 20 day of March, A. D. 1934,  
before me, a Notary Public in and for said County,  
personally appeared

John C. Ferguson and Charles E. Ferguson

and that to be the same persons described in and to the effect of this instrument - who then severally acknowledged the same to be their free act and deed.

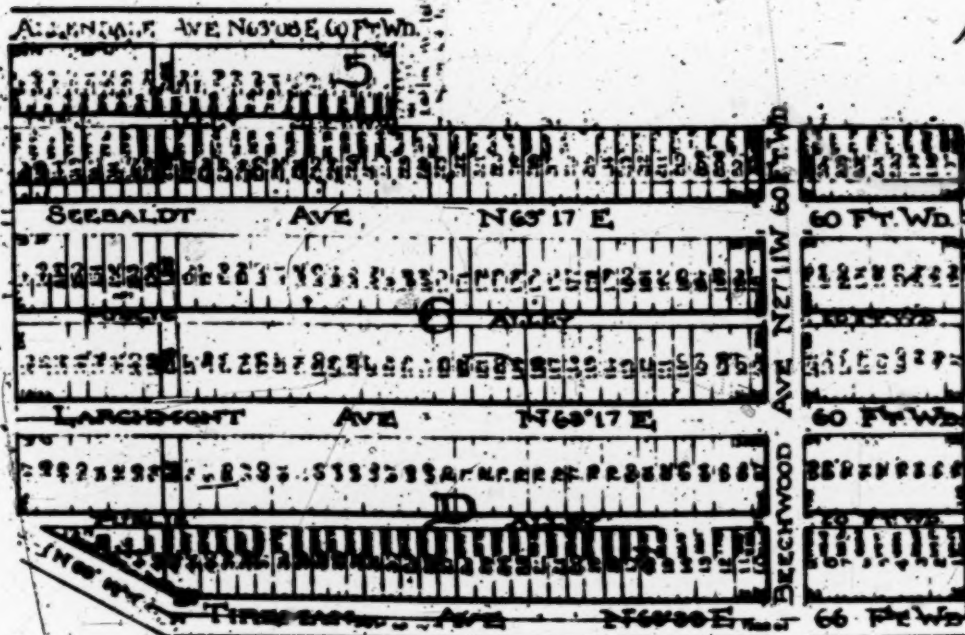
John C. Ferguson  
Notary Public  
W. Ferguson  
County, Alcona

commission expires Feb. 5, 1936

# BROOKS & KINGONS SUB.

OF

PART 4 JOSEPH TIREMANS ESTATE  $\frac{1}{4}$  SECTIONS N<sup>o</sup> 51 & 52  
 10.000 AT  $\frac{1}{4}$  FRACTIONAL SECTION 3 - T2SR11E  
 DETROIT, WAYNE CO. MICHIGAN.





183001

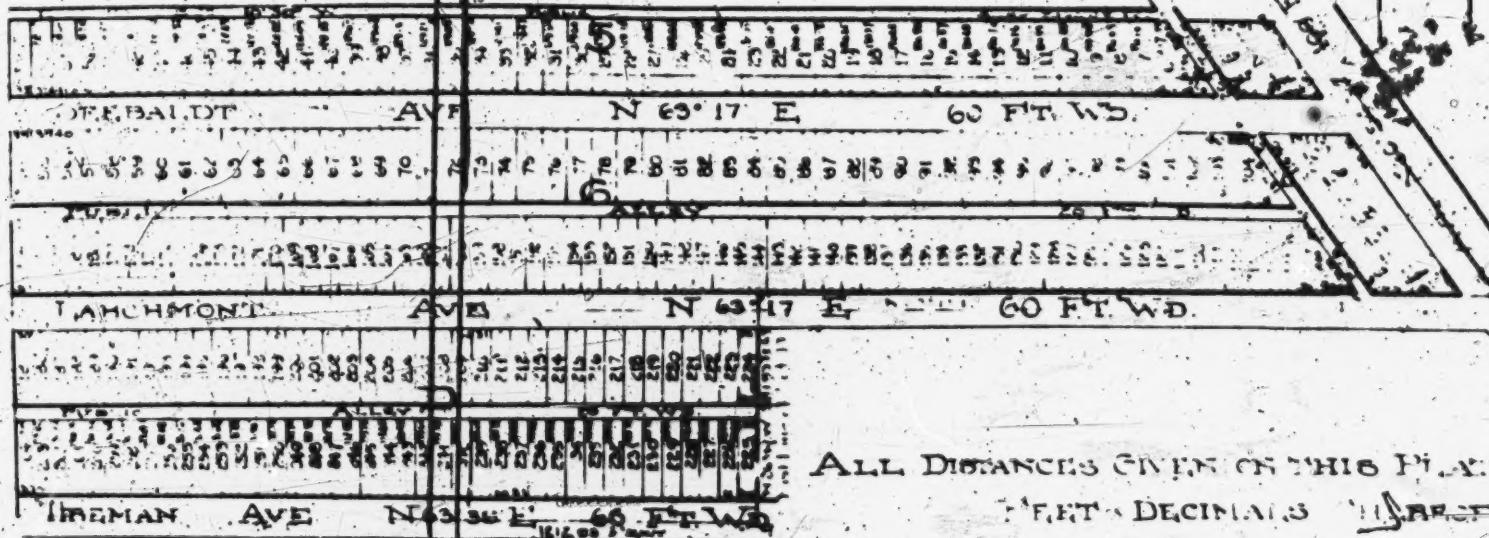
# SEEBALDT'S SUB

or

PART of JOSEPH TREMANS ESTATE  $\frac{1}{4}$  SECTIONS No 51 & 52  
10000A.T. FRACTIONAL SECTION 3 T2S R11E  
DETROIT, WAYNE CO, MICHIGAN.

Exhibit 9

65



44

Exhibit 10

C803559

1944 DEC 1 154  
1947 7284 RE 135

Abstract and Title Guaranty Company

WARRANTY DEED

**This Indenture,** Made this 30th day of

November in the year of our Lord one thousand nine hundred and forty four

Between Walter A. Joachim and Helen M. Joachim, his wife,

of 4826 Seebaldt Avenue, Detroit, Wayne County, Michigan,

parties of the first part,

and Orel Ma Ghee and Minnie S. Ma Ghee, his wife

of 6246 Iveswood Avenue - Detroit, Wayne County, Michigan

parties of the second part.

Witnesseth, that the said parties of the first part, for and in consideration of the sum of

One Dollar (\$1.00) and other good and valuable considerations

to them, in hand paid by the said parties of the second part, the receipt whereof is hereby

acknowledged, do by these presents, grant, bargain, sell, remise, release, alien and

confirm unto said parties of the second part, and to their heirs and assigns, Forever, all

certain place or parcel of land situate and being in the City of

Detroit, county of Wayne, and state of Michigan,

and described as follows, to wit: Lot Fifty-Two, (52) of Seebaldt's Subdivision

part of Joseph Tishman's Estate, quarter section Fifty-One (51)

and Fifty-Two (52), ten thousand (10,000) acre tract and fraction-

al section three (3), town Two (2) north, range Eleven (11) east,

according to the plat thereof recorded in Liber Twenty Seven (27)

of plats on page Thirty Four (34), Wayne County Records, and more

commonly known as number 4826 Seebaldt Avenue, Detroit, Michigan.



DEC 1 1944

Together with all and singular the hereditaments and appurtenances thereto belonging or in anywise appertaining: To have and to hold the said premises, as herein described, with the appurtenances unto the said parties of the second part, and to their heirs and assigns, Forever, and they said Walter A. Joachim and Helen M. Joachim, his wife parties of the first part and their heirs, executors and administrators do covenant, grant, bargain and agree to and with the said parties of the second part, if their heirs and assigns, that at the time of the executing and delivery of these presents they are well and sound of the above-granted premises in the simple; that they are free from all incumbrances whatsoever, and that they will and lawfully

For your safety, have Abstract and Title Guaranty Company have your deed

Exhibit 10

(Continued)

7284 00136

here, execution, administration shall wrap up and extend the right  
 against all lawful claims whatsoever, except  
 Subject to existing restrictions as of record.

In witness whereof the said parties of the first part have hereunto set their hand and  
 their seal the day and year first above written.

Signed, sealed and delivered in presence of

*William A. Joachin*  
 Walter A. Joachin  
*George W. Hollabaugh*  
 George W. Hollabaugh

*Halter D. Joachin*  
 Walter A. Joachin  
*Helen M. Joachin*  
 Helen M. Joachin

(L. S.)  
 (L. S.)

State of Michigan,

County of Wayne

On this 30th day of November

in the year one thousand nine hundred and forty four  
 a Notary Public, in and for said county, personally appeared Walter A. Joachin and  
 Helen M. Joachin, his wife,

to me known to be the same persons, and who  
 then acknowledged the same to be their

My commission expires

Notary Public, Wayne County, Michigan.

COPIES - 100 V 00000 11-1-38

(8903559)

Warranty Deed

RECEIVED  
 DECEMBER 1 1944  
 WAYNE COUNTY MICH

REGISTER'S OFFICE

Wayne County

This instrument was presented and  
 recorded for Record, this 11th day of  
 December, A. D. 1944  
 at 1:00 P. M. and recorded  
 in Volume 1 of Book 10 page 35  
 A certificate having been furnished to  
 the person with this Certificate, and  
 the fee thereon.

*Walter A. Joachin*

6846  
 10-1-38



# MICROCARD

TRADE MARK 

# 21



# 63



# 401



## Exhibit 15

DETROIT DEPARTMENT OF HEALTH  
Division of Vital Statistics

## PLACE OF BIRTH

MICHIGAN  
DEPARTMENT OF HEALTH  
Division of Vital Statistics

M213A 10-11-27-30 000

County of Wayne

Transcript of CERTIFICATE OF BIRTH

City of Detroit

Registered No. 2471

FULL NAME  
OF CHILD

Irvin Santini Jr. (If child is not yet named, make supplemental report, as directed)

Sex of child M, Date of birth 3-12-1908, Legitimacy P, Full Name of Mother Mrs. Mary Santini

Residence (P. O. Address) 4424, Residence (P. O. Address) Detroit

Color or Race 12, Age at last birthday 27, Color or Race 13, Age at last birthday 28

Birthplace, Occupation (And Industry) Painter, Occupation (And Industry) Same

Number of child of this mother 2

Number of children, of this mother, now living 2

## CERTIFICATE OF ATTENDING PHYSICIAN OR MIDWIFE

I hereby certify that I attended the birth of this child, who was born on the date above stated.

Have signs of child been treated with one per cent solution of silver nitrate as required by law?

(Signature)

Dated

Given or distribution name added from a

Address

supplemental report

Filed

Was there any unusual information or defect?

I hereby certify that the foregoing is a true copy of the record as filed in the Detroit Department of Health

Commissioner of Health

Deputy Registrar, Vital Statistics

Exhibit 16

PL Exp 16  
5-24-45  
2H

STATE OF MICHIGAN

## AFFIDAVIT FOR LICENSE TO MARRY

STATE OF MICHIGAN

COUNTY OF WAYNE

JUN 23 1941

19

*Crisel McShee* as applicant for a license for marriage between  
 self and *Marjorie Leatherman* being duly sworn, deposes and says

I am acquainted with the laws of Michigan relative to marriage, as printed upon the  
 back of this blank; that there is no legal impediment to the marriage of self and the other person named; and  
 I am to the best of my knowledge and belief the following statements are true:

**MALE**  
 Full name *CRISSEL MC SHEE*  
 Age of last birthday *39*  
 Race *Colored*  
 Address *6346 Elmwood*  
 City *Ypsilanti*  
 Occupation *Sticker*  
 Father's name *CRISSEL*  
 Mother's maiden name *ELLA HERRINGWEATHER*  
 Number of times previously married *None*

**FEMALE**  
 Full name *MARJORIE LEATHERMAN*  
 Age of last birthday *35*  
 Race *Colored*  
 Address *4530-28th*  
 City *Ypsilanti*  
 Occupation *Sticker*  
 Father's name *James SIMMS*  
 Mother's maiden name *Louise Thornton*  
 Number of times previously married *None*  
 Maiden name of bride is a widow *Yes*  
*Crisel McShee*

Subscribed and sworn to before me, a Notary Public

in and for

Wayne County, Michigan, this

day of

19

My commission expires *JUN 25 1941*

## EXHIBIT 17

CERTIFIED COPY OF RECORD OF MARRIAGE

100-270-100-2-41

## CERTIFIED COPY OF RECORD OF MARRIAGE



No. 494151

## MALE

Full Name..... ORCEL MC GHEE  
 Age..... 25 Color..... White  
 Residence..... Detroit, Mich.  
 Birthplace..... Ala.  
 Occupation..... Elev. Starter  
 Father's Name..... Orsel  
 Mother's Name..... Ella Morrisenth  
 Number of times previously married..... No

## FEMALE

Full Name..... DORSE DIPPAY  
 Age..... 23 Color..... White  
 Residence..... Detroit, Mich.  
 Birthplace..... Ala.  
 Occupation..... S. Teacher  
 Father's Name..... Joseph  
 Mother's Name..... Ellen  
 Number of times previously married..... No

The parties above named were joined in matrimony by ..... A. L. Linscaunt .....  
 Minister at ..... Detroit ..... Michigan, the ..... 11th  
 day of ..... July ..... A. D. 1945 in the presence of  
 ..... Alf. S. Thomas ..... of ..... Detroit, Mich.  
 ..... Alaura Carna ..... of ..... Detroit, Mich.

STATE OF MICHIGAN  
COUNTY OF WAYNE

I, CASPAR J. LINGEMAN, Clerk of the County of Wayne and of the Circuit Court thereof,  
 do hereby certify, that I have compared the foregoing copy of Record of Marriage as filed in  
 my office and recorded in Liber..... 67..... Page..... 224..... and found the said copy a correct  
 transcript thereof.

(SEAL)

In testimony whereof, I have hereunto set my  
 hand and affixed the seal of said Circuit Court  
 this 13th day of ..... Nov. .... A. D. 1945

CASPAR J. LINGEMAN, County Clerk

Deputy County Clerk

RECEIVED NY 4984

[fol. 71] IN CIRCUIT COURT OF WAYNE COUNTY

OPINION OF THE COURT—Filed August 23, 1945

This is a bill to enjoin violation of reciprocal negative easements against occupation by persons not of the Caucasian race. The restrictions were created by mutual agreements among owners after Subdivision. It is conceded that defendants are not of that race, but it is claimed that there are reasons preventing enforcement.

## I

It is claimed that several acknowledgements are defective.

One is of an outstate execution before a notary with seal. This is expressly authorized by Section 26,604, Michigan Statutes Annotated.

Again, an agreement by the officers of a corporation within the apparent scope of their authority is valid as against mere irregularities. There is no proof that the corporate covenants were executed without authority. These covenants were executed in 1934 and 1935, have been relied upon till now and the parties are barred by laches and estopped from now questioning the technical correctness of their execution.

Defendants rely on Moore v. Kimball 291 Mich. 455.

That case does not support them. It merely holds that a restriction which by its term ran for 25 years expired in 25 years, a very reasonable conclusion.

[fol. 72] Finally mutual covenants are founded on mutual considerations. Each covenantor agrees with all the covenantors.

## II

These agreements are recorded. Each lot owner had notice of them thereby. In terms they run with the land, and are binding on heirs, executors, and assigns. They are not mere personally covenants. Each purchaser who takes subject to such negative restrictive easements agrees with all others subject to them that he will observe them. This applies not only to such easements as this, but to all others, as for example, restrictions to residential purposes; to brick or stone houses; to building line restrictions, to those forbidding saloons, gambling, factories, livery stables, and so on through the long list of restrictions, all limiting the use of property, and all held valid.



## III IV V

This restriction does not violate either the Federal or the State Constitution. This court is bound on that point by:

Paramalee v. Morris, 218 Mich. 625

Schulte v. Starks, 238 Mich. 102

Corrigan v. Buckley, 271 U. S. 323

The restriction which is invalid is one preventing alienation to any person or class of persons entitled to hold interests in land. Porter v. Barrett, 233 Mich. 374.

The other points in question are ruled by the following cases:

Erickson v. Tapert, 127 Mich. 457

Allen v. Detroit, 167 Mich. 464

[fol. 73] Northwestern Home Owners v. Sheehan, 310 Mich. 188

Wilcox v. Mueller, 250 Mich. 167

Moreton v. Palmer, 239 Mich. 409

Decree may enter for plaintiffs with costs to be taxed.

Guy A. Miller, Circuit Judge.

Dated: August 22, 1945.

[fol. 74] IN CIRCUIT COURT OF WAYNE COUNTY

DECREE—Filed August 29, 1945

At a session of said court, held in the Wayne County Building, in the City of Detroit, said County and State, on this 29th day of August, A. D. 1945.

Present: The Hon. Guy A. Miller, Circuit Judge.

This case came on to be heard upon the pleadings and proofs taken in open court and was argued by counsel for the respective parties, and the court being fully advised in the premises and upon due consideration thereof, finds that all the material allegations in the bill of complaint are true as therein stated.

The court further finds that the property known as Lot No. 52 of Seebaldt's Subdivision, located on the north side of Seebaldt Avenue, between Firwood and Beechwood Ave-

ness, in the City of Detroit, Michigan, and commonly known as 4626 Seebaldt Avenue, is restricted as follows:

"This property shall not be used or occupied by any person or persons except those of the Caucasian race;"

that defendants, Orsel McGhee and Minnie S. McGhee, his wife, are not of the Caucasian race but are of the colored or Negro race; that defendants purchased said property with full knowledge of said restriction and are now using and occupying it as their residence, in violation of the above quoted restriction, which was placed upon said property and [fol. 75] duly recorded in the Office of the Wayne County Register of Deeds many years prior to the date said defendant acquired the property.

On motion of Lloyd T. Chockley, attorney for plaintiffs,

It is Ordered, Adjudged and Decreed that defendants Orsel McGhee and Minnie S. McGhee, within 90 days from the date hereof move from said property, and that thereafter said defendants be and they are hereby restrained and enjoined from using or occupying said premises, and

It Is Further Ordered, Adjudged and Decreed that after the expiration of 90 days from the date hereof that said defendants and all persons claiming through or under them be and they are hereby restrained and enjoined from violating the above restriction and from permitting or suffering said premises to be used or occupied by any person or persons excepting those of the Caucasian race, and

The particular description of the property hereinabove mentioned and referred to is as follows:

Lot No. 52 Seebaldt's Subdivision of part of Joseph Tireman Estate, Quarter Sections 51 and 52, Ten Thousand Acre Tract and Fractional Section 3, Town 2 South, Range 11 East, in the City of Detroit, Wayne County, Michigan, according to the plat thereof recorded in the Office of the Register of Deeds for Wayne County, Michigan, in Liber 27 of Plats, at page 34; commonly known as 4626 Seebaldt Avenue, Detroit, Michigan.

(Signed) Guy A. Miller, Circuit Judge.

## [fol. 76] IN CIRCUIT COURT OF WAYNE COUNTY

MOTION TO SET ASIDE DECREE—Filed October 26, 1945

Now come the defendants, Orsel McGhee and Minnie S. McGhee, his wife, by their attorneys, Willis M. Graves and Francis M. Dent, and move the court to grant a rehearing in the above matter, and to vacate and set aside the decree heretofore entered, for the following reasons:

1. Because there is no valid proof of record that the defendants are not of the Caucasian Race.
2. Because 80% of the property in question was not validly restricted.
3. Because the general plan of developing the subdivision included a large number of persons not members of the Caucasian Race as shown by the testimony.
4. Because the court did not follow the rule of construction in interpreting the restriction against use of the property as laid down by the Supreme Court of the State of Michigan.
5. Because the restriction itself is a clear violation of Article 2, Section 16, of the Constitution of the State of Michigan.
6. Because an enforcement of a restriction of this kind would in itself be a violation of the 14th Amendment of the United States Constitution.

[fol. 77] This application and motion is based upon the files and records in the above entitled cause, and the affidavit of Francis M. Dent, hereto attached.

Willis M. Graves, 446 E. Warren Avenue, Detroit 1, Michigan; Francis M. Dent, 4256 Russell Street, Detroit 7, Michigan, Attorneys for Defendants.

Dated: Oct. 26, 1945.

[fol. 78] **AFFIDAVIT ATTACHED TO MOTION TO SET ASIDE  
DECREE**

COUNTY OF WAYNE, SS:

Francis M. Dent, being duly sworn, deposes and says that he was one of the trial attorneys for the defendants in the above entitled cause, and that he is familiar with the evidence and believes that the matter as set out in the motion and application for a rehearing are true. Deponent further believes that certain cases and law not cited by the court or by the plaintiffs are decisive in this matter and for that reason, he believes that the defendants are entitled to a rehearing.

Further, deponent saith not.

Francis M. Dent, Deponent.

Subscribed and sworn to before me this 26th day of October, A.D. 1945. (Signed) Herbert L. Dudley,  
Notary Public, Wayne County, Mich. My commission expires 5-31-49.

[fol. 79] **IN CIRCUIT COURT OF WAYNE COUNTY**

**OPINION ON MOTION FOR REHEARING—Filed November 13,  
1945**

Five reasons for this motion were given upon the argument.

I. That plaintiffs did not prove defendants were not of the Caucasian race.

Plaintiffs produced photostatic copies of public records relating to the marriage license and marriage of defendants. These show that they described themselves as of the Negro race. These records are admissible as evidence of transactions in the business of the office of County Clerk, and constitute an admission by defendants. They were in court and did not take the stand. If they wish to do so they may until November 17, 1945. However, as the evidence now stands, a prima facie case has been made. I do not remember that defendants denied being of the Negro race, in their Answer.

II, III, and IV are merely restatements of arguments made on the trial and are adequately covered by the previous decision.



V: That the restriction in question violates the Federal and State Constitutions.

That it does not is conclusively established by

Corrigan v. Buckley, 271 U. S. 322;

Porter v. Barrett, 233 Mich. 374.

I have examined the cases cited by defendants. It is necessary only to say that none of them is in point, and none is inconsistent with the decisions above cited. Those decisions are conclusive of the law of the United States and of this State.

Motion denied except as indicated.

Guy A. Miller, Circuit Judge.

Dated: \_\_\_\_\_

IN CIRCUIT COURT WAYNE COUNTY

ORDER DENYING REHEARING—Filed November 16, 1945

Defendants' motion for a rehearing of the above entitled cause came on to be heard and the court, after hearing the arguments of counsel for the respective parties and having given careful consideration to the brief submitted by counsel for defendants, finds no merit in the motion and it is

Ordered that said motion be and it is hereby denied.

Guy A. Miller, Circuit Judge.

A true copy, Caspar J. Lingeman, Clerk, By Elizabeth Holder, Deputy Clerk.

[fol. 81] IN CIRCUIT COURT OF WAYNE COUNTY

ORDER GRANTING LEAVE TO APPEAL—Filed January 28, 1946

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the tenth day of January, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Henry M. Butzel, Chief Justice, Leland W. Carr, George E. Bushnell, Edward M. Shappe, Emerson R. Boyles, Neil E. Reid, Walter H. North, Raymond W. Starr, Associate Justices.

Calendar No. 43271

BENJAMIN S. SIPES, et al., Plaintiffs,

v.

ORSEL MCGHEE, et al., Defendants and Appellants

In this cause an application is filed by defendants for leave to appeal from the decree of the Circuit Court for the County of Wayne, in Chancery, and a motion to dismiss said application and a brief in opposition to the application having been had by the court, It is ordered that the application be and the same is hereby granted. It is further ordered that the stay order issued herein on December 5, 1945, be and the same is hereby continued in full force and effect until the further order of this court.

[fol. 82] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 83] IN CIRCUIT COURT OF WAYNE COUNTY

CLAIM OF APPEAL—Filed January 28, 1946

Orsel McGhee and Minnie S. McGhee, defendants in the above entitled cause, claim appeal from the Decree and Order Denying a Re-Hearing, dated November 16, 1945, by

the Honorable Guy A. Miller, one of the judges of the Wayne Circuit Court.

• Appellants take general appeal.

Francis M. Dent, 4256 Russell Street, Detroit 7, Michigan. Willis M. Graves, 446 East Warren Avenue, Detroit 1, Michigan, Attorneys for Appellants.

Dated: January 28, 1946.

[fol. 84] IN CIRCUIT COURT OF WAYNE COUNTY  
STIPULATION AS TO PRINTED RECORD

It is hereby stipulated that:

1. The printed record on the appeal herein shall consist of:

Calendar Entries  
Bill of Complaint  
Defendant's Answer  
Plaintiff's Pre-Trial Statement  
Pre-Trial Statement signed by Judge Chenot  
Defendants' Pre-Trial Statement  
Amended Answer to Bill of Complaint  
Pre-Trial Statement by Judge Jayne  
Opinion of Court  
Decree  
Motion for Re-Hearing  
Opinion on Motion  
Order Denying Motion  
Order Granting Leave to Appeal  
Claim of Appeal  
Settled Case on Appeal  
Statement of Reasons and Grounds of Appeal  
This Stipulation.

2. Any claimed mistakes in the printed record shall be settled by the original files and record and the edited transcript and exhibits used in preparing the printed record.

[fol. 85] 3. All orders extending time for appeal and service thereof were duly and timely made.

Younglove and Chockley, Attorneys for Plaintiffs.  
Willis M. Graves and Francis M. Dent, Attorneys  
for Defendants

Dated: — — — —

It is hereby stipulated that all papers requiring service have been duly and timely served and that all exhibits bear the proper certifications.

Lloyd T. Chockley of Younglove & Chockley, Attorneys for Plaintiffs and Appellees. Willis M. Graves and Francis M. Dent, Attorneys for Defendants and Appellants.

[fol. 86] IN CIRCUIT COURT OF WAYNE COUNTY

CERTIFICATE OF COURT—Filed April 9, 1946

I, Guy A. Miller, Circuit Judge, hereby settle the foregoing case which sets forth the substance of all the material testimony taken at, and all of the proceedings during, the hearing resulting in the decree of August 29, 1945, appealed from, including testimony and exhibits taken on separate record.

I further certify that as to the testimony as set forth in full by question and answer, the same are so incorporated because I deem same to be necessary to a full understanding of the questions involved.

Guy A. Miller, Circuit Judge.

We consent to the settlement of the foregoing as the settled case on appeal and waive notice of settling and signing same.

Younglove and Chockley, Attorneys for Plaintiffs and Appellees. Willis M. Graves and Francis M. Dent, Attorneys for Defendants and Appellants.

A true copy: Caspar J. Lingeman, Clerk, by Victor L. Hicks, Deputy Clerk.

Dated at Detroit, Michigan, this 9th day of April, 1946.



[fol. 87] IN SUPREME COURT OF MICHIGAN

BENJAMIN J. SIPES and ANNA C. SIPES, JAMES A. COON and  
ADDIE A. COON, et al.,

v.

ORSEL MCGHEE and MINNIE S. MCGHEE, His Wife,  
Defendants-Appellants

Before the Entire Bench

OPINION—Filed January 7, 1947

BUSHNELL, J.:

Plaintiffs Benjamin J. Sipes, Anna C. Sipes, and others own and occupy property located in Seebaldt's subdivision and Brooks and Kingon's subdivision on Seebaldt avenue, between Firwood and Beechwood avenues, in the City of Detroit.

Defendants Orsel McGhee and Minnie S. McGhee, his wife, own and occupy property located on the same street in Seebaldt's subdivision. All of the properties occupied by the parties hereto are encumbered by the following recorded covenant:

"This property shall not be used or occupied by any person or persons except those of the Caucasian race."

Defendants seek reversal of a decree upholding and enforcing this restriction. In order to obtain that result, this court is asked to overrule its holding in *Parmalee v. Morris*, 218 Mich. 625, (38 A. L. R. p. 1180) where a restriction was upheld, which read:

"Said lot shall not be occupied by a colored person, nor for the purposes of doing a liquor business thereon."

The questions involved in defendants' appeal concern the execution of recorded instruments relied upon by plaintiffs, the proof of racial indentity of the defendants, and the uncertainty of the language of the covenant and its validity.

[fol. 88] Originally there were no racial restrictions affecting the property in question. Subsequently, certain property owners, in the block in which defendants' home is

located, entered into mutual agreements imposing the above quoted restrictions. These various agreements were recorded in the office of the register of deeds of Wayne County on September 7, 1935. The agreements provide that the restriction in question should not be effective unless at least 80 per cent of the property fronting on both sides of the street in the block is subjected "to this or a similar restriction." The deed running to defendants, which is dated November 30, 1944, and recorded on December 1, 1944, is "subject to existing restrictions as of record."

The testimony taken was not extensive and decision turns here, as it did in the circuit court, principally on legal questions. The main factual issue was with respect to the racial identity of the defendants. Sipes testified, over objections as to his qualifications as an expert, that defendants and their two sons are colored people. On cross-examination, he testified:

"I have seen Mr. McGhee, and he appears to have colored features. They are more darker than mine. I haven't got near enough to the man to recognize his eyes. I have seen Mrs. McGhee, and she appears to be the mulatto type."

Defendants did not take the witness stand, and the only testimony produced in their behalf was that of Dr. Norman Humphrey, an assistant professor of Sociology and Anthropology at Wayne University. He expressed the opinion that there is no simple way in which to determine whether a man is a member of the Mongoloid, Caucasoid, or Negroid race. He explained that such classifications are very difficult and cannot be determined without scientific tests. Melvin Tumin, an instructor in the same department, stated that he agreed with the testimony of Dr. Humphrey.

The trial judge did not mention this subject in the written opinion which he filed, but the circuit court decree contains a finding—

"that defendants, Orsel McGhee and Minnie S. McGhee, his wife, are not of the Caucasian race but are of the colored or Negro race."

[fol. 89] The testimony of Sipes is sufficient to sustain this finding. See *People v. Dean*, 14 Mich. 406, 423.

Appellants claim that the restrictive agreement was not properly executed by at least 80 per cent of the property owners in the block. The signature of one of the property

owners was acknowledged before a notary public in Indiana. There is no certificate of the clerk of the court or the secretary of state of Indiana attached showing that the notary public who executed the acknowledgment had authority to do so on the date mentioned.

Under the uniform acknowledgment act (3 Comp. Laws 1929, 13333, Stat. Ann. 26.604) it was held in *Reid v. Rylander*, 270 Mich. 263, that such certificate was not necessary, the notary's seal of office being sufficient.

Defendants also question the validity of the group acknowledgments, and the authority of certain corporate officers to execute the restrictive agreement. Our *de novo* examination of the recorded instruments discloses that they were properly executed and acknowledged by the owners of more than 80 per cent of the property covered by the restriction.

The policy was early established in this State that courts will uphold acknowledgments wherever possible and will not suffer conveyances or proof of them to be defeated by technical or unsubstantial objections. See *Morse v. Hewett*, 28 Mich. 481; *Nelson v. Graff*, 44 Mich. 433; *King v. Merritt*, 67 Mich. 194; and *Carpenter v. Dexter*, 8 Wall. 513 (75 L. Ed. 426).

Appellants argue that the restriction under consideration is void for uncertainty. This argument is based upon the following quotation from in the Matter of the Application of Drummmond Wren, Supreme Court of Ontario, No. 669-45, decided in October, 1945, where that trial court held that the phrase, "Land not to be sold to Jews or persons of objectionable nationality," was too indefinite to be enforceable. Mr. Justice Mackay said in that case:

"Counsel for the applicant contended before me that the restrictive covenant here in question is void for uncertainty. So far as the words 'persons of objectionable nationality' are concerned, the contention admits of no contradiction. The conveyancer who used these words surely must have realized, if he had given the matter any thought, that no [fol. 90] court could conceivably find legal meaning in such vagueness. So far as the first branch of the covenant is concerned, that prohibiting the sale of the land to 'Jews,' I am bound by the recent decision of the House of Lords in *Clayton v. Ramaden*, (1943) 1 All. E. R. 16, to hold that the covenants is in this respect also void for uncertainty; and

I may add, that I would so hold even if the matter were *res integra*. The Law Lords in *Clayton v. Ramsden* were unanimous in holding that the phrase 'Jewish parentage' was uncertain and Lord Romer was of the same opinion in regard to the phrase 'of Jewish faith.' I do not see that the bare term 'Jews' admits of any more certainty."

This observation could not be made concerning the language of the restriction now under consideration. It is difficult to see how language could be more certain than that employed, i. e., "This property shall not be used or occupied by any person or persons except those of the Caucasian race."

No one could contend either that persons of the Mongoloid or Negroid races are embraced within the term "Caucasian," or that this term does not specifically exclude all other races. The covenant in question is not void on the ground that it is uncertain.

The principle that contracts in contravention of public policy are not enforceable should be applied with caution, and only in cases plainly within the reasons on which that doctrine rests. *Skutt v. City of Grand Rapids*, 275 Mich. 258, 264. In this same case this court adopted the meaning of public policy from *Pittsburgh, C. C. & St. L. R. Co. v. Kinney*, 95 Ohio St. 64 (115 N. E. 505, L. R. A. 1917D, 641, 643, Ann. Cas. 1918 B, 286):

"What is the meaning of 'public policy'? A correct definition, at once concise and comprehensive, of the words 'public policy,' has not yet been formulated by our courts. Indeed, the term is as difficult to define with accuracy as the word 'fraud' or the term 'public welfare.' In substance, it may be said to be the community common sense and common conscience, extended and applied throughout the State to matters of public morals, public health, public safety, public welfare, and the like. It is that general and well-settled public opinion relating to man's plain palpable [fol. 91] duty to his fellow man, having due regard to all the circumstances of each particular relation and situation.

"Sometimes such public policy is declared by Constitution; sometimes by statute; sometimes by judicial decision. More often, however, it abides only in the customs and conventions of the people,—in their clear consciousness and conviction of what is naturally and inherently



just and right between man and man. It regards the primary principles of equity and justice and is sometimes expressed under the title of social and industrial justice, as it is conceived by our body politic. When a course of conduct is cruel or shocking to the average man's conception of justice, such course of conduct must be held to be obviously contrary to public policy, though such policy has never been so written in the bond, whether it be Constitution, statute or decree of court. It has frequently been said that such public policy is a composite of constitutional provisions, statutes and judicial decisions, and some courts have gone so far as to hold that it is limited to these. The obvious fallacy of such a conclusion is quite apparent from the most superficial examination. When a contract is contrary to some provision of the Constitution, we say it is prohibited by a statute, not by a public policy. When a contract is contrary to a settled line of judicial decisions, we say it is prohibited by the law of the land, but we do not say it is contrary to public policy. Public policy is the cornerstone—the foundation—of all Constitutions, statutes, and judicial decisions, and its latitude and longitude, its height and its depth, greater than any or all of them. If this be not true, whence came the first judicial decision on matter of public policy? There was no precedent for it, else it would not have been the first.' "

The public policy of this state as to racial discrimination has been expressed in various ways. In chapter 21 of the penal code the Civil Rights sections prohibit such discriminations in public educational institutions and places of public accommodation, amusement, and recreation, 146-148 of Act No. 328, Pub. Acts 1931, (Stat. Ann. 28.343-28.345) and *Ferguson v. Gies*, 82 Mich. 358, and *Bolden v. Grand Rapids Operating Corp.*, 239 Mich. 318.

Discrimination by State Mental institutions and in the public schools because of race or color is prohibited by statute. 2 Comp. Laws 1929, 6922 (Stat. Ann. 14.845) 2 [fol. 92] Comp. Laws 1929, 7156 (1), Stat. Ann. 15.76 and 2 Comp. Laws 1929, 7368 (Stat. Ann. 15.380).

Life insurance companies doing business in this State are prohibited from making any distinction or discrimination between white and colored persons. 3 Comp. Laws 1929, 12457 (Stat. Ann. 24.293).

It is also the public policy of this State, as expressed in decisions of this court too numerous to mention, to permit and enforce certain restrictions upon the use and occupancy of real property. See authorities listed in Callaghan's Michigan Digest, Vol. 3, pp. 371-403.

Restrictions of a contractual nature are valuable property rights. They cannot even be taken under the power of eminent domain without compensation. *Allen v. City of Detroit*, 167 Mich. 464, and *Johnstone v. Detroit, Grand Haven & Milwaukee R. R. Co.*, 245 Mich. 65, (67 A. L. R. 373). See, also 122 A. L. R. 1464. These rules of property, which have existed during most of the life of the State, should not be brushed aside in the absence of strong and cogent reasons.

As indicated in *Dolby v. State Highway Commissioner*, 283 Mich. 609, 615:

"A recognized rule of property ought not to be overturned without the very best of reasons. *Lewis v. Sheldon*, 103 Mich. 102; *Pleasant Lake Hills Corp. v. Eppinger*, 235 Mich. 174."

In *Parmalee v. Morris*, 218 Mich. 625, it was held that a restrictive covenant similar to the one now under consideration was not void as against public policy.

Restrictions against alienation are quite another matter. This court pointed out the difference in *Porter v. Barrett*, 233 Mich. 373 (42 A. L. R. 1267) following the rule enunciated in *Maudlebaum v. McDonall*, 29 Mich. 78, and held that a restriction prohibiting the sale of certain lands "to a colored person" was void.

The *Parmalee* and *Porter* authorities were followed in *Schulte v. Starks*, 238 Mich. 102. See annotations in 66 A. L. R. at page 531.

Defendants argue that a restriction prohibiting the use of property by other than those of the Caucasian race violates the due process clause of the Constitution of Michigan. (Art. 2, 16) This applicability of this clause was not discussed in *Parmalee v. Morris*, 218 Mich. 625. While we [for 93] recognize that the concept of "due process" is incapable of exact definition, yet, ever since *Buck v. Sherman*, 2 Doug. 176, we have held that this constitutional right means that every person having property rights affected by litigation is entitled to notice, and a day in court, or a rea-

sonable opportunity to appear and defend his interest. See *Chrysler Corporation v. Unemployment Compensation Commission*, 301 Mich. 351, and *Dation v. Ford Motor Co.*, 314 Mich. 152. Such rights were accorded the defendants in the instant case.

It is argued that the restriction in question violates the 14th Amendment to the Constitution of the United States. Appellees say that this argument was answered in *Corrigan v. Buckley*, 271 U. S. 323 (70 L. ed. 969). We so read the *Corrigan* case, although that decision partly turned on the inapplicability of the equal protection clause of the 14th Amendment to the District of Columbia, and the appeal was dismissed for want of jurisdiction.

Defendants argue that the language—

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” (art. 14, 1 U. S. Const.)

means that the judicial acts of courts of a sovereign state are the acts of that state within the constitutional inhibition. They conclude therefrom that the decree in this cause was unconstitutional state action in that it deprived them of “the equal protection of the laws.” To accept this reasoning would also at the same time deny “the equal protection of the laws” to the plaintiffs and prevent the enforcement of their private contracts.

We have never hesitated to set aside a law which was repugnant to the equal protection clause of the amendment but, on the other hand, we have never applied the constitutional prohibition to private relations and private contracts.

We were recently urged to apply a racial restriction to property under a claimed general plan, in *Kathan v. Stevenson*, 307 Mich. 485. This we declined to do. See, also, *Kathan v. Williams*, 309 Mich. 219, and *Gableman v. Department of Conservation*, 309 Mich. 416. We are not aware of any decision of courts of last resort, State or Federal, which have applied this constitutional prohibition to private agreements containing racial restrictive covenants.

The several amicus curiae briefs indulge in considerable [fol. 94] amplification and elaboration upon appellant's

arguments on public policy and the constitutional questions involved in this appeal. In addition, these briefs contain valuable material with respect to the related social and economic problems. We are impressed with the fact that the Negro population of Detroit has increased from 40,438 in 1920 to approximately 210,000 in 1944, and that it then was approximately 12 per cent, of the population of the city.

The arguments based on the factual statement pertaining to questions of public health, safety and delinquency are strong and convincing. However, we must confine our decision to the matters within the record submitted to us and the questions raised in the briefs of the parties to the cause.

It is suggested that the intervention of a World War and the declarations of statesmen and international deliberative bodies now makes the device of restrictive covenants against minority racial groups a matter of concern and public policy rather than that of private contract, as was assumed by the court in the *Parmalee* decision in 1922. Some of the briefs go so far as to insist that the declaration of the Atlantic Charter and the United Nations' conference at San Francisco are international treaties and have the effect of law.

We do not understand it to be a principle of law that a treaty between sovereign nations is applicable to the contractual rights between citizens of the United States when a determination of these rights is sought in State courts. So far as the instant case is concerned, these pronouncements are merely indicative of a desirable social trend and an objective devoutly to be desired by all well-thinking peoples. These arguments are predicated upon a plea for justice rather than the application of the settled principles of established law.

We direct attention to the differentiation made by Mr. Justice Oran M. Butler, between justice and law, in *Duncan v. Magette*, 25 Tex. 241, 251 decided in 1861. He said:

"I avail myself of the opportunity afforded by this application, to present my own views upon the foundation and force of this appeal to the sense of justice of the court, whether used as an influencing consideration, in interpreting and enforcing the rules of law, or directly urged as the basis of judicial action. A frequent recurrence to first [fol. 95] principles is absolutely necessary in order to keep precedents within the reason of the law."



"Justice is the dictate of rights, according to the common consent of mankind generally, or of that portion of mankind who may be associated in one government, or who may be governed by the same principles and morals:

"Law is a system of rules, conformable, as must be supposed, to this standard, and devised upon an enlarged view of the relations of persons and things, as they practically exist. Justice is a chaotic mass of principles. Law is the same mass of principles, classified, reduced to order, and put in the shape of rules, agreed upon by this ascertained common consent. Justice is the virgin gold of the mines, that passes for its intrinsic worth in every case, but is subject to a varying value, according to the scales through which it passes. Law is the coin from the mint, with its value ascertained and fixed, with the stamp of government upon it which insures and denotes its current value.

"The act of moulding justice into a system of rules detracts from its capacity of abstract adaptation in each particular case; and the rules of law, when applied to each case, are most usually but an approximation to justice. Still, mankind have generally thought it better to have their rights determined by such a system of rules, than by the sense of abstract justice, as determined by any one man, or set of men, whose duty it may have been to adjudge them.

"Whoever undertakes to determine a case solely by his own notions of its abstract justice, breaks down the barriers by which rules of justice are erected into a system, and thereby *by* annihilates law.

"A sense of justice, however, must and should have an important influence upon every well organized mind in the adjudication of causes. Its proper province is to superinduce an anxious desire to search out and apply, in their true spirit, the appropriate rules of law. It cannot be lost sight of. In this, it is like the polar star that guides the Voyager, although it may not stand over the port of destination.

"To follow the dictates of justice, when in harmony with the law, must be a pleasure; but to follow the rules of law, in their true spirit, to whatever consequences they may lead, is a duty. This applies as well to rules establishing remedies, as to those establishing rights. These views will, [fol. 96] of course, be understood as relating to my own convictions of duty, and as being the basis of my own judicial action."

In this appeal we are obliged to differentiate between public rights and private or contractual rights. The former is unquestionably the responsibility of the State, but the action of a State court in requiring or refusing enforcement of private contractual rights is, in our opinion, not within the prohibitions of the 14th Amendment. To hold otherwise would be to nullify many statutory enactments and overrule countless adjudicated cases. The unsettling effect of such a determination by this court, without prior legislative action or a specific Federal mandate, would be, in our judgment, improper.

It is impossible, within the confines of this opinion, to distinguish and differentiate the numerous authorities cited pro and con in the various briefs. We do, however, direct attention to a most recent annotation of authorities on the subject in 162, A. L. R. 180, et seq., which follows the opinion in *Mays v. Burgess*, 79 App. D. C. 343 U. S. 868; rehearing denied, 325 U. S. 896. See, also 36 *Harvard Law Review*, December, 1922; 12 *University of Chicago Law Review*, February, 1945; 33 *California Law Review*, March, 1945.

What we must determine in this appeal is whether we shall now overrule *Parmalee v. Morris*, 218 Mich. 625.

We are guided in our consideration of this problem by our statements in the recently decided case of *Bricker v. Green*, 313 Mich. 218.

After a careful study, we are not persuaded that the rule laid down in the *Parmalee* case was wrong, or is wrong now.

It is controlling with respect to the instant case.

The decree entered by the trial court is affirmed, with costs to appellees.

Signed: George E. Bushnell, Leland W. Carr, Henry M. Butzel, Edward M. Sharpe, Neil E. Reid, John R. Dethmers, Walter H. North, Emerson R. Boyles.

([File endorsement omitted.]

[fols. 97-99] IN SUPREME COURT OF MICHIGAN

Present the Honorable Leland W. Carr, Chief Justice, Henry M. Butzel, George E. Bushnell, Edward M. Sharpe, Emerson R. Boyles, Neil E. Reid, Walter H. North, John R. Dethmers, Associate Justices.

BENJAMIN J. SIPES, et al., Plaintiffs,

vs.

ORSEL MCGHEE, et al., Defendants and Appellants

JUDGMENT—January 7, 1947

This cause having been brought to this Court by appeal from the Circuit Court for the County of Wayne, in Chancery, and having been argued by counsel, and due deliberation had thereon, it is now ordered, adjudged and decreed by the Court, that the decree of the Circuit Court for the county of Wayne, in Chancery be and the same is hereby in all things affirmed.

And it is further ordered, adjudged and decreed that the plaintiffs do recover of and from the defendants, their costs to be taxed.

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IN SUPREME COURT OF MICHIGAN

[Title omitted]

SUBMISSION OF MOTION FOR REHEARING—February 18, 1947

In this cause a motion for rehearing is duly submitted.

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[fol. 100] IN SUPREME COURT OF MICHIGAN

[Title omitted]

APPLICATION AND MOTION FOR REHEARING

Now come the defendants and appellants by their attorneys, Willis M. Graves and Francis M. Dent, and move the court to grant a rehearing in the above matter, which was decided on January 7, 1947 because the court erred in the following respects:

I. In holding that it was requested to overrule its decision in the case of *Parmalee v. Morris*, 218 Michigan 625.

II. In holding that the racial identity of the defendants had been established as Negroes.

III. In holding that the defendants were not deprived of equal protection of the law as guaranteed by the XIV Amendment of the United States Constitution.

[fol. 101] IV. In holding that the decree of a court of equity, holding enforcement of agreements restricting the legal occupancy of a man's own home is not such State action as is prohibited by the XIV Amendment to the United States Constitution.

V. In holding that property held by title in Fee Simple cannot be used in any legal way by its owner.

VI. In holding that a restrictive covenant against occupancy against certain races is not against the public policy of the State of Michigan.

VII. In holding that state courts are not bound by treaties of the United States as set out in Article VI, Section 2 of the United States Constitution.

VIII. In holding that contracts and property rights supersede human rights.

This motion is based upon files and record in the above entitled cause and upon the affidavit of Willis M. Graves hereto attached.

Francis M. Dent, Willis M. Graves, Attorneys for  
Defendants and Appellants.

Dated: 20th of January, 1947.

[fol. 102]

[Title omitted]

# AFFIDAVIT IN SUPPORT OF MOTION FOR REHEARING

STATE OF MICHIGAN,  
County of Wayne, ss:

Willis M. Graves, being first duly sworn, deposes and says that he is one of the trial attorneys in the above entitled cause and that he has read the opinion of this



court as handed down on January 7, 1947, and that he is familiar with all of the records and briefs in this cause filed herein.

Deponent further states that he believes that the reasons and arguments, herein set forth for the purpose of the application for a rehearing, are substantial and not dilatory and that this motion is made to protect the rights [fol. 103] of the defendants and appellants and especially in application for an appeal to the Supreme Court of the United States.

Further than this deponent says not.

Willis M. Graves.

Subscribed and sworn to before me this 20th day of January, A. D. 1947. Oza A. Jolly, Notary Public, Wayne County, Michigan.

My commission expires June 7, 1949.

[fol. 104]

[Title omitted]

#### ARGUMENT IN SUPPORT OF MOTION FOR REHEARING

1. The defendants did not specifically ask the court to overrule the case of *Parmalee v. Morris*, 218 Michigan 625. In fact, the defendants requested that the court follow that opinion in the following respect:

"Were defendant's claim of rights based upon any action taken by the authority of the State an entirely different question would be presented."

Page 625—*Parmalee v. Morris*, supra.

We have shown or attempted to show that the authority of the state has been used at every point in a proceeding of this kind. That is, for example, the Register of Deeds accepts the covenant for record for which the Statute gives [fol. 105] him no authority to do. Then the court, acting as an arm of the state first holds such a restrictive covenant valid, and then by virtue of its constitutional authority seeks to enforce said covenant by contempt proceedings and with the aid of the sheriff.

II. The burden of proof was upon the plaintiff as to the defendants' racial identity. In fact, no competent evi-

dence was submitted by the plaintiffs—since it has been held repeatedly by this court that only experts could give opinion evidence. The only such evidence introduced was that by the defendants. We desire that the courts specifically say whether or not a layman may give opinion evidence on the question of a person's racial identity. The case cited by this court in *People v. Dean*, 14 Michigan 406, 423, holds that:

“All persons in whom white blood so far preponderates that they have less than one-fourth of African blood are white, and no other persons of African descent can be so regarded.”

No evidence at all as to the percentage of any kind of blood or descent was offered in the instant case. The Statutes of Michigan give the plaintiffs the right to subpoena the defendants for close examination. Since they did not do this there is no burden upon the defendants, themselves, to attempt to prove the plaintiffs' case.

III. This court in *Kuhn v. Common Council*, 70 Michigan 537, makes the following statement:

“Property does not consist merely of the title and possession. It includes the rights to make *any legal* use of it . . . or to sell and transfer it . . . .”

[fol. 106] *Holden v. Hardy*, 169 U. S. 366, 391, uses the following language:

“Property is more than the thing which a person owns. It is elementary that it includes the right to acquire, *use* and dispose of it. The Constitution protects these *essential* attributes of property.”

“That one may dispose of his property, subject only to the control of lawful enactments curtailing that right in the public interest, must be conceded.”

*Buchanan v. Warley*, 245 U. S. 60, 75.

“Property consists of the *free, use, enjoyment* and disposal of a person's acquisition without control or diminution *save by the law of the land*.”

*1 Blackstone's Commentaries (Cooley's Ed.)* 127.

Certainly by no stretch of the imagination can private agreements by individuals make occupancy of one's own property illegal.

IV. The defendants and appellants show in their brief before the Supreme Court in the instant case, pages 45 to 47, both inclusive, that the decree of a court upholding restrictions is such state action as is prohibited by the XIV Amendment to the Federal Constitution.

We quote here a case, cited in our briefs and not discussed in the court's opinion, that we contend is conclusive in that it discusses fully the question of "occupancy." That case, quoted here, did not deal primarily with purchase and sale of property, but solely with the question of the color of the occupant. The question before the United States Supreme Court was stated:

[fol. 107] "The concrete question here is: May the occupancy, and necessarily, the purchase and sale of property of which occupancy is an incident, be inhibited by the States, or by one of its municipalities, solely because of the color of the proposed occupant of the premises? That one may dispose of his property, subject only to the control of lawful enactments curtailing that right in the public interest, must be conceded. The question now presented makes it pertinent to inquire into the Constitutional right of the white man to sell his property to a colored man, having in view the legal status of the purchaser and the occupant."

*Buchanan v. Warley*, 245 U. S. 60, 75.

We therefore contend that any action depriving a person of occupancy by reason of the occupant's color, under state authority, is state action prohibited by the XIV Amendment to the United States Constitution.

V. The Statutes of the State of Michigan define a title in Fee Simple in Section 12922—Sec. 2 of the Michigan Compiled Laws, 1929:

"Every estate of inheritance shall continue to be termed a fee simple, or fee; and every such estate, when not defeasible or conditional, shall be a fee simple absolute, or an absolute fee."

Certainly if a person is prohibited to occupy his own property he does not have a title in Fee Simple. The due processes of law clause of the XIV Amendment to the Constitution, would fully protect him against any attempt of

a State Court to deprive him of the principal incident of property.

VI. The Constitutional Convention of the State of Michigan has seen fit to grant people of Negro descent all the [fol. 108] rights that people of any other racial identity have in the State of Michigan. The people of the State of Michigan then adopted this Constitution. Nothing in our judgment could show more clearly the public policy of the entire state as opposed to some subdivision in an over-crowded city than this action by the people.

The elected representatives in the state legislature have taken every means in their power to also set out the same public policy for the state.

The courts of the state also followed this public policy until the case of *Parmalee v. Morris* decided in June, 1922. The case of *Ferguson v. Gies*, 82 Michigan 358, was until the decree of *Parmalee v. Morris*, possibly the strongest statement of the absolute rights of Negroes of the public policy of the State of Michigan toward them in the United States. The only instances in which this has been departed from are cases in which restrictions against the legal use of property has been attempted by private individuals, under color of law and with state authority. The only thing that has given these restrictions the force of a law (for all intents and purposes, a statute) has been the court-made law in this line of cases. It is difficult to say, in view of the above facts, how the courts of this state can say such race restrictions are not against public policy.

VII. Article VI, Clause 2<sup>d</sup> of the Constitution of the United States declares:

"The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme [fol. 109] Law of the Land and *the Judges in every State shall be bound thereby*, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding" (Italics added).

The Constitution in so many words, says that a treaty entered into by the United States with another or other nations constitutes law which has precedence over all other law throughout this country.



The rationale underlying this supremacy has been fully interpreted in *Kennett v. Chambers*, 14 How. 38, by Mr. Justice Taney, whose opinion states, in part, that:

“... as the sovereignty resides in the people, every citizen is a portion of it, and is himself personally bound by the laws which the representatives of the sovereignty may pass, or the treaties into which they may enter, within the scope of their delegated authority.”

*Missouri v. Holland*, 252 United States 416;  
*Hauenstein v. Lynham*, 100 United States 483;  
*Nielson v. Johnson*, 279 United States 47;  
*De Geofrey v. Riggs*, 133 United States 258;  
*United States v. Pink*, 315 United States 203.

The court, per Taney, J. states in *Kenneth v. Chambers*:

“These treaties, while they remained in force were, by the Constitution of the United States, the supreme law, and binding not only upon the government, but upon every citizen. No contract could lawfully be made in violation of their provisions.”

VIII. We quote the following from the opinion of the court in the instant case:

“These rules of property, which have existed during [fol. 110] most of the life of the state, should not be brushed aside in the absence of strong and cogent reasons.”

We believe that an opinion handed down as recently as January 7, 1946, should be a strong and cogent reason why this court should put human rights above property rights. We quote from the opinion of Mr. Justice Black:

“When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. As we have stated before the rights to exercise the liberties safeguarded by the First Amendment ‘lies at the foundation of free government by free men and we must in all cases’ weigh the circumstances

and appraise the reasons in support of the regulation of those rights."

*Marsh v. State of Ala.*, 90 Lawyers Ed. No. 6,  
page 227, 66 Supreme Court 276;  
*Schneider v. Irvington*, 308 U. S. 147, 161.

In a concurring opinion in *Marsh v. Alabama*, supra, Mr. Justice Frankfurter said:

"So long as the scope of the guaranties of the Due Process Clause of the 14th Amendment by absorption of the First remains that which the court gave in the series of cases in the October term 1942, the circumstances of the present case appear to me to clearly fall within it."

[fols. 111-112]

#### Conclusion

In view of the above reasons and the argument in support thereof, we believe that the court should grant a rehearing and that such a rehearing should reverse and set aside the decree of the court below. In case this court does not feel so inclined, we ask that it grant a stay of proceedings in order that the defendants and appellants may apply for reference to appeal to the Supreme Court of the United States.

Respectfully submitted, Francis M. Dent, Willis N. Graves, Attorneys for Defendants and Appellants.

[fol. 113]

IN SUPREME COURT OF MICHIGAN

[Title omitted]

#### OBJECTIONS TO REHEARING

Plaintiffs and appellants herein object to the granting of a rehearing as prayed by defendants and appellees, and for answer to the eight assignments of error, say:

[fol. 114]

#### I

As this court in *Parmalee v. Morris*, 218 Mich. 625, held a racial restriction valid and enforced it, we cannot see how it would be possible for the court to hold the restriction in this case invalid without overruling the *Parmalee* case. It is therefore clear that appellants by asking that the restric-

tion be held invalid did by necessary implication ask that *Parmalee v. Morris* be overruled.

## II

The racial identity of defendants as negroes was clearly established by the testimony of the neighbors and by an affidavit made by defendant, Orsel McGhee, in his application for license to marry, in which he stated under oath that both he and his wife were colored.

This court has repeatedly held that the language in a restriction is to be taken in its ordinary and generally understood, or popular sense, and is not to be subjected to technical refinement.

- Galton v. Heftler*, 284 Mich. 445;
- Seeley v. Phi Sigma Delta*, 245 Mich. 253;
- Tabern v. Gates*, 231 Mich. 581;
- Library, etc. Ass'n v. Gbosen*, 229 Mich. 89.

Under this rule there can be no doubt or misunderstanding as to what was intended by this restriction or of its application to defendants herein, who do not deny that they are negro.

## III

The claim that defendants were deprived of equal protection of the law as guaranteed by the XIV Amendment to the Constitution of the United States has been passed upon and decided adversely to such claim by this court in [fol. 115] *Parmalee v. Morris*, 218 Mich. 625, by the United States Supreme Court in *Corrigan v. Buckley*, 271 U. S. 323, and by every other court of last resort to which it has ever been submitted. See note to *Mays v. Burgess*, 162 A. L. R. 168.

## IV

The claim that this court by its decree enforcing a private contract violates the XIV Amendment finds no support either in reason or precedent. The Amendment provides that "no State shall make or enforce any law . . .," and in this case no law is involved, only a private contract which defendants admit is not unconstitutional (appellants' brief, p. 45-46). To refuse to enforce this valid contract would deny to plaintiffs the equal protection of the law. On precedent defendants have been unable to find a single case in

which any court of last resort has ever refused to enforce a private contract because of the provisions of the XIV Amendment.

## V

To claim broadly as defendants do under this head that property held by title in fee simple can be used in any legal way by its owner, is so obviously wrong as to scarcely require argument. To so hold would invalidate all restrictions, easements, and leases. All the foregoing are examples of valid and legal contracts which curtail the right of an owner to make certain uses of his property. All are lawful and all have been universally upheld and enforced by the courts without question.

## VI

That racial restriction covenants are not contrary to the public policy of Michigan has been decided by this court in [fol. 116] *Parmalee v. Morris*, *supra*, and by the courts of every other State to which the question has ever been submitted. Note to *Mays v. Burgess*, 162 A. L. R. 168.

## VII

This court did not hold that it was not bound by treaties of the United States. It merely held that generalized statements in certain public documents would not control the rights of private citizens of the United States to make contracts between themselves regarding their own private property.

## VIII

This court did not hold that contracts and property rights supersede human rights, and plaintiffs did not and do not claim that such holding should be made. We simply claim that white people have rights as well as negroes and that among these is the right to make their homes and rear their children in white neighborhoods. The issue as stated on page 632 of the *Parmalee* case, is a simple one, i.e., "shall the law applicable to restrictions as to occupancy contained in deeds to real estate be enforced or shall one be absolved from the provisions of the law simply because he is a negro?"



[fol. 117]

## Conclusion

In their motion for a rehearing defendants do not claim that the court has misapprehended the facts nor do they cite any authorities or advance any reasons which have not been fully argued and considered.

It is respectfully submitted the motion should be denied.

Younglove & Chockley, Attorneys for Plaintiffs and Appellees. Business Address: 1510 Ford Building, Detroit 26, Michigan.

[fol. 118]

IN SUPREME COURT OF MICHIGAN

[Title omitted]

## ORDER DENYING MOTION FOR REHEARING—March 3, 1947

A motion for rehearing having been heretofore submitted herein, it is hereby denied, with costs to plaintiffs.

IN SUPREME COURT OF MICHIGAN

[Title omitted]

## ORDER GRANTING STAY—April 8, 1947

In this cause a motion is filed by defendants for a stay of proceedings pending appeal to the Supreme Court of the United States, and due consideration thereof having been [fol. 119] had by the Court. It is ordered that all proceedings in said cause be stayed for a period of thirty days from and after this date, and that any further stay must be obtained from the Supreme Court of the United States.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol.120] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 23, 1947

The petition herein for writ of certiorari to the Supreme Court of the State of Michigan is granted, and the case is assigned for hearing immediately following the argument in No. 1268, Shelley vs. Kraemer.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Reed took no part in the consideration or decision of this application.

(1562)

FILE COPY

U.S. Supreme Court, U.S.

MAY 10 1947

CHARLES ELMORE GIFFLEY

IN THE

**Supreme Court of the United States**  
**October Term, 1946**

No. **1363**

37

ORSEL MCGHEE and MINNIE S. MCGHEE,  
his wife, *Petitioners.*

v.

BENJAMIN J. SIPES and ANNA C. SIPES;  
JAMES A. COON and ADDIE A. COON,  
*et al., Respondents.*

**PETITION AND BRIEF IN SUPPORT OF PETITION  
FOR WRIT OF CERTIORARI TO THE SUPREME  
COURT OF MICHIGAN**

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IN THE  
**Supreme Court of the United States**  
October Term, 1946.

No. \_\_\_\_\_

ORSEL MCGHEE and MINNIE S. MCGHEE,  
his wife,

*Petitioners,*

*v.*

BENJAMIN J. SIPES and ANNA C. SIPES,  
JAMES A. COON and ADDIE A. COON,  
*et al.,*

*Respondents.*

**PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF MICHIGAN**

*To the Honorable, the Chief Justice of the United States  
and the Associate Justices of the Supreme Court of the  
United States:*

Petitioners respectfully pray that a writ of certiorari  
issue to review a judgment of the Supreme Court of the  
State of Michigan affirming a final judgment for respon-  
dents and plaintiffs in the original suit in the Circuit Court  
of the County of Wayne in chancery.



### **Jurisdiction**

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended (28 U. S. Code 344 (b)).

The judgment sought to be reviewed was entered by the Supreme Court of the State of Michigan on the 7th of January, 1947, (R. 87) and petitioners' motion for a rehearing was denied on the 3rd of March, 1947 (R. 118). The opinion of the Supreme Court of Michigan is reported at 316 Mich. 614, and is also filed as part of the record (R. 87).

### **B.**

#### **Summary Statement of the Matter Involved**

##### **1. Suit and the parties thereto.**

This proceeding originated as a suit in equity in the Circuit Court for the County of Wayne, in chancery, in the State of Michigan against the petitioners for the purpose of obtaining an injunction restraining the petitioners from using or occupying property which had been purchased by them and which they were occupying as their home (R. 16).

Petitioners were found by lower court to be Negroes (R. 74). Prior to the present suit, they purchased and became the occupants of an improved parcel of residential property in the City of Detroit, County of Wayne, State of Michigan, more fully described as 4626 Seebaldt Avenue (R. 16, 19). Petitioners are the owners of record title to the property in fee simple and occupied it as their home

(R. 19). In this action, the respondents sought and obtained a decree requiring the petitioners to move from said property and thereafter restraining them from using or occupying the premises and, further, restraining petitioners from violating a race restrictive covenant upon such land, set forth more fully below (R. 74, 75).

## 2. Theory and factual basis of the suit.

The essential facts are undisputed. On or about the 20th day of June, 1934, John C. Ferguson and his wife, the then owners of the premises now occupied by petitioners, 4626 Seebaldt Avenue, executed a certain agreement providing in its essential parts as follows:

"We, the undersigned owners of the following described property:

Lot No. 52 Seebaldts Sub. of Part of Joseph Tireman's Est. 1/4 Sec. 51 & 52 10 000 A T and Fr'l Sec. 3, T 2 S, R 11 E.

for the purpose of defining, recording, and carrying out the general plan of developing the subdivision which has been uniformly recognized and followed, do hereby agree that the following restriction be imposed on our property above described, to remain in force until January 1st, 1960—to run with the land, and to be binding on our heirs, executors, and assigns:

"This property shall not be used or occupied by any person or persons except those of the Caucasian race"

"It is further agreed that this restriction shall not be effective unless at least eighty percent of the property fronting on both sides of the street in the block where our land is located is subject to this or a similar restriction." (R. 63).

This contract was subsequently recorded at Liber 4505, page 610, of the Register of the County of Wayne on the 7th day of September, 1935. Similar agreements were executed on forty-nine lots of property located within the subdivision within which the lot which is the subject of this suit is located (R. 55, 56). Petitioners purchased said property on the 30th of November, 1944 from persons holding under the said Fergusons, who executed the restriction. Bill of Complaint herein was filed on the 30th of January, 1945.

C

Questions Presented

I

Whether judicial enforcement of a restriction against the use of land by Negroes constitutes a violation of the Fourteenth Amendment.

II

Whether agreements restricting the use of land by members of racial or religious minorities is against the public policy of the United States.

The foregoing questions were seasonably and properly raised in the Wayne County Circuit Court and in the Supreme Court for the State of Michigan, and were considered and decided adversely to the petitioners herein in both of said courts. However, the opinion of the Supreme Court of Michigan was based upon *stare decisis*, and stated:

"The unsettling effect of such a determination by this court without prior legislative action or a specific Federal mandate would be, in our judgment, improper (R. 96).

### Reasons Relied on for Allowance of Writ

1. Judicial enforcement of the agreement in question is violative of the Constitution and laws of the United States.

(a) The right of a citizen to use, occupy and enjoy his property is guaranteed by the Constitution and laws of the United States.

United States Constitution, Article IV, Sec. 2,  
Fifth Amendment, Fourteenth Amendment;

*Ward v. Maryland*, 12 Wall. 418;

*The Slaughter House Cases*, 16 Wall. 36;

*Buchanan v. Warley*, 245 U. S. 60.

(b) The State, through the courts below, has been the effective agent in depriving petitioners of their property, and the exercise of constitutionally protected rights therein.

(c) Action by a state, through its judiciary, prohibiting or impairing, on account of race or color, the right of a person to use, occupy and enjoy his property is violative of the constitutional guarantee of due process.

*Ex parte Virginia*, 100 U. S. 339;

*Virginia v. Rives*, 100 U. S. 313;

*Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226;

*Raymond v. Chicago Traction Co.*, 207 U. S. 20;



*Mooney v. Holohan*, 294 U. S. 103;

*American Federation of Labor v. Swing*, 312 U. S. 321.

(d) The agreement in its inception was subject to constitutional limitations upon the power of the courts to enforce it.

*Norman v. B. & O. R. Co.*, 294 U. S. 240;

*Home Building & Loan Assoc. v. Blaisdell*, 290 U. S. 398.

(e) The issue here presented has never been decided by this Court.

*Corrigan v. Buckley*, 271 U. S. 323;

*Smith v. Allwright*, 321 U. S. 649.

2. A restriction against the use of land by members of a racial minority is contrary to the public policy of the United States.

Constitution of the United States, Thirteenth, Fourteenth and Fifteenth Amendments;

*The Slaughter House Cases*, *supra*;

*Strauder v. West Virginia*, 100 U. S. 303;

*Tunstall v. Brotherhood of Firemen, etc.*, 323 U. S. 210;

*Steele v. Louisville & N. R. Co.*, 323 U. S. 192;

*In re Drummond Wren*, 4 D. L. R. 674;

7  
United Nations Charter

Preamble

Articles 55 and 56.

Sociologists, experts in city planning, crime prevention and race relations have established that limitations upon the use of land for living space by members of racial or religious minorities constitute one of the gravest dangers to democratic society which we face in America, and in the light of these dangers the courts must consider and weigh the effects of their use of the injunctive power to extend such limitations in the face of the resulting damage to the whole of society.

In support of the foregoing grounds of application, petitioners submit herewith the accompanying brief setting forth in detail the pertinent facts and argument applicable thereto.

Petitioners further state that this application is filed in good faith and not for purposes of delay.

**Conclusion**

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Michigan be granted.

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IN THE  
**Supreme Court of the United States**  
October Term, 1946.

No. \_\_\_\_\_

ORSEL MCGHEE and MINNIE S. MCGHEE,  
his wife,

*Petitioners,*

BENJAMIN J. SIPES and ANNA C. SIPES,  
JAMES A. COON and ADDIE A. COON,  
*et al.,*

*Respondents.*

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF  
CERTIORARI TO THE SUPREME COURT OF MICHIGAN**

**Opinion of Court Below**

The opinion of the Supreme Court of the State of Michigan is reported at 316 Mich. 614.

**Jurisdiction**

The jurisdiction of the Court is invoked under Section 237 of the Judicial Code, as amended, (28 U. S. Code 344 (b)).

The judgment sought to be reviewed was entered by the Supreme Court of the State of Michigan on the 7th of January, 1947 (R. 87) and application for rehearing was denied on the 3rd of March, 1947 (R. 118).

### **Statement of the Case**

The statement of the case and a statement of the salient facts from the record appear in the accompanying petition for certiorari.

### **Errors Below Relied Upon Here**

- I. The Judicial Arm of the Government has Imposed Racial Restrictions in Violation of the Constitution and Laws of the United States.
- II. The Restriction Against the Use of Land by Minorities Involved in This Case was Held not to Be Contrary to Public Policy.

### **Summary of Argument**

- I. Judicial Enforcement of the Agreement in Question is Violative of the Constitution and Laws of the United States.
  - A. The Right of a Citizen to Occupy, Use and Enjoy His Property is Guaranteed by the Constitution and Laws of the United States.
  - B. The State, Through the Courts Below, Has Been The Effective Agent in Depriving Petitioners of Their Property, And The Exercise of Their Constitutionally Protected Rights Therein.
  - C. Action by a State, Through Its Judiciary, Prohibiting or Impairing, On Account of Race or Color, The Right of a Person to Use, Occupy, and Enjoy His Property Is Violative of The Constitutional Guarantee of Due Process.
  - D. The Agreement In Its Inception Was Subject To Constitutional Limitations Upon The Power of The Courts to Enforce It.
  - E. The Issue Here Presented Has Never Been Decided By This Court.
- II. A Restriction Against the Use of Land by Members of Racial Minorities is Contrary to Public Policy of the United States.



## ARGUMENT

### I

#### Judicial Enforcement of the Agreement in Question is Violative of the Constitution and Laws of United States.

##### A. The Right of a Citizen to Occupy, Use and Enjoy His Property is Guaranteed by the Constitution and Laws of the United States.

Petitioners were and still are the owners in fee simple of the premises in question. The decree complained of deprives them of their right to occupy, use and enjoy their property.

The significant protective bases of the rights thus denied these petitioners are Article IV, Section 2, and the Fifth and Fourteenth<sup>2</sup> Amendments of the Constitution of the United States, and Congressional legislation enacted pursuant thereto.

Whether privileges inherent in state or federal citizenship,<sup>1</sup> they are guaranteed safety from attack by state governments.<sup>2</sup>

##### B. The State, Through the Courts Below, Has Been the Effective Agent in Depriving Petitioners of Their Property, and the Exercise of Their Constitutionally Protected Rights Therein.

When, as here, a State court enforces a racial covenant, it is the action of the State, and not the action of individ-

<sup>1</sup> See *Ward v. Maryland*, 12 Wall. 418, 430; *The Slaughter House* cases, 16 Wall. 36.

<sup>2</sup> *Buchanan v. Warley*, 245 U. S. 60; *Harmon v. Tyler*, 273 U. S. 668; *City of Richmond v. Deans* (C. C. A. 4), 37 F. (2d) 712, aff'd 281 U. S. 704.

uals, which deprives the Negro occupant of his right to enjoy his property.

The creation, modification and destruction of rights in property are controlled, not by individual action itself, but by the legal consequences which the State attaches to it. If a Negro is privately persuaded to refrain from occupying or purchasing property by reason of the fact that such a covenant exists, or if each party to the restrictive agreement, by reason of the restriction or otherwise, refuses to sell to a Negro, it is the action of the parties which effectively keeps him out. The same is true as to other private sanctions which they may be able to apply without resort to governmental forces.

But when private sanctions are ineffective to compel obedience to the covenant, and it is necessary to appeal to the courts for its enforcement, individual action ceases and governmental action begins. It is obvious that in a situation where, as here, a Negro purchases and enters into the possession of property upon which there is a racial restriction, he has lost nothing and has been deprived of nothing, by reason merely of the making of the restrictive agreement or the private compulsions of the parties thereto; this is best evidenced by the fact that petitioners are still in occupancy and that the proponents of the covenant find it necessary to go into court to oust them. But when the Court commands him to remove from the premises, an arm of the State government has effected a deprivation.

The decree has all the force of a statute. It has behind it the sovereign power. It is not the respondent, but the sovereignty, speaking through the Court that has issued a mandate to the petitioners enjoining them from occupying, using or enjoying their property.

**C. Action by a State, Through Its Judiciary, Prohibiting or Impairing, on Account of Race or Color the Right of a Person to Use, Occupy and Enjoy His Property Is Violative of the Constitutional Guarantee of Due Process.**

In *Buchanan v. Warley*,<sup>3</sup> this Court firmly established that there is a general right afforded all persons alike by the constitutional guaranty of due process, to use, occupy and enjoy real property without restriction by state action predicated upon race or color. In that case, the Court was faced with an ordinance of the City of Louisville, Kentucky, providing that colored persons could not occupy houses in blocks where the greater number of houses were occupied by white persons, and which contained the same prohibitions as to white persons in blocks where the greater number of houses were occupied by colored persons. Buchanan, the plaintiff, brought an action against Warley, a Negro, for the specific performance of a contract for the sale of the former's lot to the latter. Warley defended upon a provision in his contract excusing him from performance in the event that he should not have, under the laws of the state and city, the right to occupy the property, and contended that the ordinance prevented his occupancy of the subject matter of the contract. It was held, however, that the ordinance was unconstitutional as violative of the due process clause of the Fourteenth Amendment. The Court said:

"The concrete question here is: May the occupancy, and, necessarily, the purchase and sale of property of which occupancy is an incident, be inhibited by the states, or by one of its municipalities, solely because of the color of the proposed occupant of the premises? • • •"

<sup>3</sup> 245 U. S. 60.

<sup>4</sup> 245 U. S. 75.

"Colored persons are citizens of the United States and have the right to purchase property and enjoy and use the same without laws discriminating against them solely on account of color. *Hall v. DeCuir*, 95 U. S. 485, 508. These enactments did not deal with the social rights of men, but with those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color. Civil Rights Cases, 109 U. S. 3, 22. The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color. • • • •

"We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the state, and is in direct violation of the fundamental law enacted in the 14th Amendment of the Constitution preventing State interference with property rights except by due process of law. • • • •"

In *Harmon v. Tyler*,<sup>7</sup> this Court was again faced with an attempt to accomplish substantially the same end by an ordinance prohibiting the sale or lease of property to Negroes in any "community or portion of the city" • • • except on the written consent of a majority of the persons of the opposite race inhabiting such community or portion of the city." This ordinance likewise was held to be invalid. Still later, legislation effecting a residential segregation predicated upon the intermarriage interdiction was held by this Court to be bad.<sup>8</sup> Substantially all of the State and lower Federal Courts since considering the constitu-

<sup>6</sup> 245 U. S. 78-79.

<sup>7</sup> 245 U. S. 82.

<sup>8</sup> 273 U. S. 668.

<sup>9</sup> *Deans v. City of Richmond*, 281 U. S. 704.



tional validity of such legislative enactments have reached the same conclusion.<sup>9</sup>

For the reasons considered in *Buchanan v. Warley*, it would have been beyond the legislative power of the State to have enacted a law seeking the accomplishment of the end sought to be attained by the covenant here involved, or by a law providing that a covenant in the precise terms of that involved in the present case should be enforceable in its courts. It is inconceivable that, so long as the legislature refrains from passing such a law, a State court may, by its decree, compel the specific observance of such covenants and thus afford governmental sanction to a device which it was not within the competency of its legislative branch to authorize. Yet the immediate consequence of the decree now under consideration is to bring about that which the legislative and executive branches of the State are powerless to accomplish.

It is clear that such property rights as are protected by the constitutional guaranty of due process against impairment by the legislature are equally protected against impairment by the judiciary. It is now established that the prohibitions of the Fourteenth Amendment apply to all conceivable forms of State action, including that by its courts.<sup>10</sup> Such action is found when a court predicates its

<sup>9</sup> *Irvine v. City of Clifton Forge*, 124 Va. 781, 97 S. E. 310; *Glover v. City of Atlanta*, 148 Ga. 285, 96 S. E. 562; *Jackson v. State*, 132 Md. 311, 103 A. 910; *Bowen v. City of Atlanta*, 159 Ga. 145, 125 S. E. 199; *Clinard v. City of Winston-Salem*, 217 N. C. 119, 6 S. E. 2d 867; *Allen v. Oklahoma City*, 175 Okla. 421, 52 P. 2d 1054; and see the cases cited, *supra*. It will be noted that in the *Allen* case, the ordinance was sought to be aided by an exercise of the executive power.

<sup>10</sup> *Ex Parte Virginia*, 100 U. S. 339; *Virginia v. Rives*, 100 U. S. 313; *Chicago, B. & O. R. Co. v. Chicago*, 166 U. S. 226; *Raymond v. Chicago Traction Co.*, 207 U. S. 20; *Mooney v. Holohan*, 294 U. S. 103.

judgment upon a rule of substantive law developed in the common law, or judge-made law, of a State. Such a rule, so made and applied, is as much the product of State action and is as much subject to the same tests of validity, as if made by that other form of State action, enactment by the legislature. This Court has had frequent occasion to apply this principle. Thus, where a State court grants an injunction against peaceful picketing on the ground that such conduct is forbidden by the common law of the State, its action infringes the Fourteenth Amendment to the same extent as would a statute in similar provision which abridges the freedom of speech which the Fourteenth Amendment commands all States to respect.<sup>11</sup> Likewise, where an individual is convicted in the court of a State of inciting a breach of the peace, a criminal offense under the judge-made law of the State, its action may be condemned on the same grounds.<sup>12</sup> In similar fashion, the constitutional guaranties of free speech may be impinged upon by a State court judgment inflicting a contempt sentence under its version of the common law of the State with respect to punishable contempts of court.<sup>13</sup> And, where a judgment of a State court accomplishes a taking of private property without just compensation, the State has produced a result forbidden by the due process clause.<sup>14</sup> The large body of cases holding that the State has acted where its courts have given effect to a rule of procedure held by it to be a part of the common law of the State, but in effect bringing about a denial of constitutional rights, also serves to emphasize the role of the court as an arm of the State

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<sup>11</sup> *American Federation of Labor v. Swing*, 312 U. S. 321; *Bakery Drivers Local v. Wohl*, 315 U. S. 769.

<sup>12</sup> *Cantwell v. Connecticut*, 310 U. S. 296.

<sup>13</sup> *Bridges v. California*, 314 U. S. 252.

<sup>14</sup> *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226.

and the consequent production of an unconstitutional result.<sup>15</sup>

The mere fact that in *Buchanan v. Warley*, the forbidden state action was initiated by the legislative department, while, in the instant case, the action was initially individual in character, makes no difference once the judicial arm of the State has acted. There can be no difference between State action predicated upon prior individual action and that which is not predicated thereon—the Fourteenth Amendment prohibits both. When the Court acts, its action is entirely independent of that of the litigants, and where private action ceases and court action commences, the permission of the one ends and the prohibition of the other begins.

**D. The Agreement in its Inception was Subject to Constitutional Limitations Upon the Power of the Courts to Enforce it.**

The Supreme Court of Michigan erroneously assumed that when private individuals enter into a restrictive agreement, the Court is obligated to enforce the same. But the courts cannot avoid responsibility under the Fourteenth Amendment by the "convenient apologetics" of an obligation which they cannot constitutionally discharge. There is no absolute freedom of contract in the sense that judicial enforcement of an agreement is automatically forthcoming. The right to contract is subject to a variety of restrictions, of which the usury laws, gambling laws, Sunday laws, the Sherman Anti-Trust Act, peonage sections of the Criminal Code, the National Labor Relations Act and prevention of

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<sup>15</sup> *Twining v. New Jersey*, 211 U. S. 78; *Brinkerhoff-Faris Co. v. Hill*, 281 U. S. 673; *Powell v. Alabama*, 287 U. S. 45; *Moore v. Dempsey*, 261 U. S. 86; *Scott v. McNeal*, 154 U. S. 34.

unfair competition by the Federal Trade Commission, are illustrative. It is likewise clear that where, by reason of constitutional prohibitions, a court is prevented from enforcing an agreement privately made, there can be no claim that there has been an unjustified interference with liberty of contract. In such a case every individually-made contract from its inception is subject to the infirmity that judicial enforcement cannot be obtained if, so to enforce it, a violation of constitutionally protected rights will follow.

The right of an individual to make a contract is subject to the paramount authority vested in government by the Federal Constitution. Thus, in *Norman v. Baltimore & O. R. Co.*,<sup>16</sup> it was held that the joint resolution abrogating the Gold Clause stipulation in money contract obligations could be applied to pre-existing private agreements, since all individual agreements are made subject to the exercise of the Federal power to regulate the value of money.

Again, in *Home Building and Loan Association v. Blaisdell*,<sup>17</sup> it was held that a state statute might, in spite of the prohibitions in the Federal Constitution against state impairment of the obligations of a contract, be applied in such manner that the previously made contract would be impaired, since all contracts made between individuals are subject to the paramount authority of the State to enact laws validly within its police power.

It is the duty of the courts to enforce contracts so long as the court may do so consistently with the supreme law of the land. If, however, a court lends its aid to the enforcement of a segregation restriction, with the result that a Negro is deprived of his constitutional right to occupy

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<sup>16</sup> 294 U. S. 240.

<sup>17</sup> 290 U. S. 398.



property, there is an infringement of the constitutional guaranties of due process within the holding of this Court in *Buchanan v. Warley*.

The contract involved in this case must be understood as having been made subject to existing constitutional limitations upon the authority of the state to enforce it, and although the declination of the Court to enforce the agreement effectively prevents it from ripening in the manner desired by the contracting parties, its action could not be considered as the denial to them of any constitutionally protected rights.

**E. The Issue Here Presented Has Never Been Decided by This Court.**

Judicial enforceability of racial restrictive covenants has frequently been assumed to follow from the decision of this Court in the case of *Corrigan v. Buckley*.<sup>18</sup> A reexamination of that case makes it apparent that the issue here presented was neither presented nor decided there.

About 30 white persons, including the plaintiff and defendant Corrigan, who were the owners of 25 parcels of land, executed and recorded an indenture in which they mutually covenanted that no part of the properties covered would ever be sold to or occupied by Negroes. A year later, defendant Corrigan entered into a contract to sell to defendant Curtis, a Negro, a house and lot situated within the restricted area. Plaintiff thereupon brought suit to enjoin the sale to and occupancy by defendant Curtis. Both defendants moved to dismiss the bill upon grounds which did

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<sup>18</sup> 55 App. D. C. 30, 299 Fed. 899; appeal denied 271 U. S. 323.

not question the constitutional propriety of judicial enforcement of the covenant.<sup>19</sup> The motions were denied and an appeal to the Court of Appeals for the District of Columbia<sup>20</sup> taken, where the issue was stated as follows:

“... The sole issue is the power of a number of landowners to execute and record a covenant running with the land, by which they bind themselves, their heirs and assigns, during a period of 21 years, to prevent any of the land described in the covenant from being sold, leased to, or occupied by Negroes.”

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<sup>19</sup> Defendant Corrigan moved to dismiss the bill on the grounds that the “indenture or covenant made the basis of said bill” is (1) “void in that the same is contrary to and in violation of the Constitution of the United States,” and (2) “is void in that the same is contrary to public policy.” Defendant Curtis moved to dismiss the bill on the grounds that it appeared therein that the indenture or covenant “is void, in that it attempted to deprive the defendant, the said Helen Curtis, and others of property, without due process of law; abridges the privilege and immunities of citizens of the United States, including the defendant, Helen Curtis, and other persons within this jurisdiction (and denies them) the equal protection of the law, and therefore, is forbidden by the Constitution of the United States, and especially by the Fifth, Thirteenth, and Fourteenth Amendments thereof, and the Laws enacted in aid and under the sanction of the said Thirteenth and Fourteenth Amendments.” From the opinion of the Supreme Court of the United States, 271 U. S. 328-329.

<sup>20</sup> 55 App. D. C. 30, 299 Fed. 899.

Following an affirmance of the decree, an appeal to this Court<sup>21</sup> was taken under the provisions of Section 250 of the Judicial Code. This Court stated the issue as follows:<sup>22</sup>

"Under the pleadings in the present case the only constitutional question involved was that arising under the assertions in the motions to dismiss that the indenture or covenant which is the basis of the bill is 'void' in that it is contrary to and forbidden by the 5th, 13th and 14th Amendments. . . ."

In dismissing the appeal for want of jurisdiction, this Court said:<sup>23</sup>

"And, while it was further urged in this Court that the decrees of the courts below in themselves deprived the defendants of their liberty and property without due process of law, in violation of the 5th and 14th Amendments, this contention likewise cannot serve as a jurisdictional basis for the appeal. Assuming that such a contention, if of a substantial character, might have constituted ground for an appeal under paragraph 3 of the Code provision, it *was not raised* by the petition for the appeal or by any assignment of error, either in the Court of Appeals or in this Court; and it likewise is lacking in substance. . . ."

"Hence, without a consideration of these questions, the appeal must be, and is, dismissed for want of jurisdiction." (Italics supplied.)

<sup>21</sup> 271 U. S. 323.

<sup>22</sup> 271 U. S. 329-330.

<sup>23</sup> 271 U. S. 331-332.

It must be concluded, therefore, that the constitutionality of judicial enforcement of such an agreement was not decided in *Corrigan v. Buckley*.<sup>24</sup>

While the *Corrigan* decision contains an intimation by way of dictum that no constitutional question is presented

<sup>24</sup> Close examination of the opinion reveals that the Court actually decided only four propositions:

(1) That since the Fourteenth Amendment, by its terms, directs its prohibitions only to state action, it was not violated by the creation of the covenant. Thus, defendants' motions to dismiss on this ground did not raise any constitutional question, and therefore afforded no basis for an appellate review in the Supreme Court as a matter of right.

(2) That Sections 1977 and 1978 (U. S. C., secs. 41 and 42) of the Revised Statutes neither render the covenant void nor raise any substantial federal question, but merely give all citizens of the United States the same right in every state and territory to make and enforce contracts, to purchase, lease and hold real property, etc., as is enjoyed by white citizens, and this, only against impairment by state action. Hence, individual action consisting in entering into a restrictive agreement is not forbidden.

(3) That the contention that the covenant was against public policy, and therefore void, is purely a question of local law, and so could not afford a substantial basis for an appeal to the Supreme Court.

(4) That the objection that the entry of the decrees in the lower courts enforcing the covenant constituted state action in violation of the Fifth and Fourteenth Amendments, was not raised in the petition for appeal or by assignment of error either in the Court of Appeals or in the Supreme Court, and was therefore not before the Court for decision.

In recognition of this, the Supreme Court of Michigan in the instant case considered *Corrigan v. Buckley* inapplicable, saying:

"It is argued that the restriction in question violates the 14th Amendment to the Constitution of the United States. Appellees say that this argument was answered in *Corrigan v. Buckley*, 271 U. S. 323. We do not so read the *Corrigan* case, but rather that the decision there turned on the inapplicability of the equal protection clause of the 14th Amendment to the District of Columbia, and that the appeal was dismissed for want of jurisdiction, 316 Mich. 614. (The certified copy of the opinion and the opinion as reported at 25 N.W. (2d) 638, and as filed reads as quoted. In the Advance Michigan reports, the second sentence reads, 'We so read the *Corrigan* Case, although that decision partly turned . . . .')."



by the facts of that case, it is to be remembered that this Court was not then committed to the doctrine that common law determinations of courts can constitute reviewable violations of the due process clause. But the Court is now committed to that doctrine.<sup>25</sup>

This Court has additional reason for reinterpreting its decision in the *Corrigan* case.

"In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to re-examine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day. *This is particularly true when the decision believed erroneous is the application of a constitutional principle* rather than an interpretation of the Constitution to extract the principle itself." (Emphasis supplied.)<sup>26</sup>

## II

### **A Restriction Against the Use of Land by Members of Racial Minorities Is Contrary to Public Policy of the United States.**

#### **A. The Public Policy of the United States.**

Fundamental national policies expressed in the Constitution and laws of the United States are offended by the restrictive agreement involved in the present case. The constitutionality of judicial enforcement of such restrictions is challenged in another section of this brief. But it is clear that even before the issue of constitutionality is

<sup>25</sup> Argument, Part IC.

<sup>26</sup> *Smith v. Allwright*, 321 U. S. 649, 665, 666.

reached, the constitutional prohibition against legislation must at least reflect national policy against the abuse of private power to accomplish the same result.

The Thirteenth Amendment to the Constitution was adopted to abolish slavery and the Fourteenth and Fifteenth Amendments to abolish the badges of servitude which remained in the treatment of the recently freed slave. These were the first steps in creating a public policy, and were so recognized by this Court in 1872 when the memory of the struggle for the adoption of the amendments was still alive.

"... no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."<sup>27</sup>

"... The words of the Amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distictively as colored; exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations, which are steps toward reducing them to the condition of a subject race."<sup>28</sup>

At the close of the Second World War, which was so largely waged for the principles of racial and religious equality as enunciated in the Atlantic Charter, the United

<sup>27</sup> *Slaughter-House Cases*, 16 Wall. 36, 71.

<sup>28</sup> *Strauder v. West Virginia*, 100 U. S. 303, 308.

States solemnly dedicated itself, with the other members of the United Nations, to promote universal respect for the observance of "human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." (United Nations Charter, Articles 55 and 56.) The preamble of the Charter of the United Nations contains the following statement:

"We, the people of the United Nations, determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . . and for these ends to practice tolerance and live together in peace with one another as good neighbors . . ."

Such a dedication by treaty on the part of the United States, ratified by the Senate, has deepened and reinforced the previous national public policy against racial and religious discrimination at law.

Ample precedent for the adoption of the view here advocated is supplied by the recent decision of a Canadian Court,<sup>29</sup> which involved an application of the owner of certain registered lands to have declared as invalid a restrictive covenant assumed by him when he purchased these lands, and which he agreed to exact from his assigns. The restriction was:

Land shall not be sold to Jews or persons of objectionable nationality.

The Court, after considering numerous relevant sources (including the San Francisco Charter, speeches of Presi-

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<sup>29</sup> *In re Drur and Wren* (1945), 4 D. L. R. 674.

dent Roosevelt, Winston Churchill, and General Charles de Gaulle, and the Constitution of the Union of Soviet Socialist Republics), held that the restriction was void, saying:

"How far this is obnoxious to public policy can only be ascertained by projecting the coverage of the covenant with respect both to the classes of persons whom it may adversely affect, and to the lots or subdivisions of land to which it may be attached. So considered, the consequences of judicial approbation of such a covenant are portentous. If sale of a piece of land can be prohibited to Jews, it can equally be prohibited to Protestants, Catholics or other groups or denominations. If the sale of one piece of land can be so prohibited, the sale of other pieces of land can likewise be prohibited. In my opinion, nothing could be more calculated to create or deepen divisions between existing religious and ethnic groups in this province, or in this country, than the sanction of a method of land transfer which would permit the segregation and confinement of particular groups to particular business or residential areas, or conversely, would exclude particular groups from particular business or residential areas. The unlikelihood of such a policy as a legislative measure is evident from the contrary intention of the recently-enacted Racial Discrimination Act, and the judicial branch of government must take full cognizance of such factors.

"Ontario, and Canada too, may well be termed a province, and a country, of minorities in regard to the religious and ethnic groups which live therein. It appears to me to be a moral duty, at least, to lend aid to all forces of cohesion, and similarly to repel all fissiparous tendencies which would imperil national unity. The common law courts have by their actions over the years, obviated the need for rigid constitutional guarantees in our policy by their wise use of the doctrine of public policy as an active agent in the promotion of the public weal. While



courts and eminent judges have, in view of the powers of our legislatures, warned against inventing new heads of public policy, I do not conceive that I would be breaking new ground were I to hold the restrictive covenant impugned in this proceeding to be void as against public policy. Rather would I be applying well-recognized principles of public policy to a set of facts requiring their invocation in the interest of the public good.

"That the restrictive covenant in this case is directed in the first place against Jews lends poignancy to the matter when one considers that anti-semitism has been a weapon in the hands of our recently-defeated enemies, and the scourge of the world. But this feature of the case does not require innovation in legal principle to strike down the covenant; it merely makes it more appropriate to apply existing principles. If the common law of treason encompasses the stirring up of hatred between different classes of His Majesty's subjects, the common law of public policy is surely adequate to void the restrictive covenant which is here attacked.

"My conclusion therefore is that the covenant is void because offensive to the public policy of this jurisdiction. This conclusion is reinforced, if reinforcement is necessary, by the wide official acceptance of international policies and declarations frowning on the type of discrimination which the covenant would seem to perpetuate."

In their effort to rise from slavery to equality with their fellow men, colored citizens are everywhere met by the effort to keep them down, and to deny them that equal opportunity which the Constitution secures to all. If they can be forbidden to live on their own land by an instrumentality of the government, they can be forbidden to work at their own trade. Yet this Court has most recently extended its protection to Negro workers against use of

government power to exclude them from their trade.<sup>30</sup> Without protection against such judicial action to implement private agreements, the prejudice, against which the war amendments were framed to defend the colored people, triumphs over them, and the amendments themselves become dead letters—as do the solemn obligations of the United Nations Charter.

**B. The Demonstrable Consequences of Racial Zoning by Court Enforcement of Restrictive Covenants are Gravely Injurious to the Public Welfare.**

Residential segregation, which is sought to be maintained by court enforcement of the race restrictive covenant before this Court, “has kept the Negro occupied sections of cities throughout the country fatally unwholesome places, a menace to the health, morals and general decency of cities, and plague spots for race exploitation, friction and riots!” *Report of the Committee on Negro Housing of the President, Conference on Home Building*, Vol. VI, pp. 45, 46 (1932).

The extent of overcrowding resulting from the enforced segregation of Negro residents is daily increasing. The United States Census of 1940 examines the characteristics of 19 million urban dwellings. The census classifies a dwelling as overcrowded if it is occupied by more than 1½ persons per room. On this basis 8 percent of the units occupied by whites in the nation are classified in the 1940 census as overcrowded, while 25 percent of those occupied by non-whites are so classified. In Baltimore, Maryland, Negroes comprise 20 percent of the population yet are

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<sup>30</sup> See *Tunstall v. Brotherhood of Firemen and Engineers*, 323 U. S. 210, and *Steele v. Louisville & N. R. Co.*, 323 U. S. 192.

constricted in 2 percent of the residential areas. In the Negro occupied second and third wards of Chicago, the population density is 90,000 per square mile, exceeding even the notorious overcrowding of Calcutta.

Census figures show that 8 percent of the non-white residents of the Detroit-Willow Run Area lived at a density in excess of  $1\frac{1}{2}$  persons per room, while only 2.3 percent of the white residents were classified as overcrowded in the census of 1940.<sup>31</sup>

The critical lack of housing facilities in Michigan's non-white population is emphasized by the following quotation from another census study of the Detroit Metropolitan District.

"Vacancy rates were generally lower in Negro sections than in white sections. The gross vacancy rate among dwelling units for Negro occupancy was 0.4 percent and among those for white occupancy 0.8 percent.

"Habitable vacancies represented about seven eighths of the unoccupied dwellings intended for white occupants and one half of those for Negro occupants.

"Crowded dwelling units—those housing more than  $1\frac{1}{2}$  persons a room—made up 1.3 percent of the dwellings in white neighborhoods and 7.4 percent of the dwellings in Negro neighborhoods. These units [Negro housing] had only one percent of all the entire area but were occupied by three percent of its population." (U. S. Department of Commerce, Bureau of Census, Special Survey H. O. No. 143, August 23, 1944.)

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<sup>31</sup> U. S. Dept. of Commerce, Bureau of Census, Series C. A. 3, No. 9, Oct. 1, 1944.

The overcrowding of the entire community during the period from 1940 to 1944 can be emphasized by the growth of the Detroit Metropolitan District's population from 2,295,867 in 1940 to 2,455,035 in 1944. During the same period the non-white population in the Metropolitan area increased from 171,877 to 250,195 (U. S. Department of Commerce, Bureau of Census, Population Series C. A. 3 No. 9, October 1, 1944).

According to the Bureau of Census, the non-white population of Detroit itself increased from 150,790 in 1940 to 213,345 in June of 1944, a percentage increase of 41.5 percent.

The City of Detroit Interracial Committee has recently completed a study of its work for the calendar year 1946, released on March 17, 1947, based upon which it has issued a statement of policy from which the following quotation is taken:

#### *"Housing*

Every informed person in Detroit knows of the acute housing shortage existing not only locally but throughout the country. This shortage, which affects all people, is felt especially by veterans and the younger married group. The already serious problem is further complicated for the Negro share of the population, however, by the existence of certain obstacles to suitable housing over and above those encountered by other citizens. While other minority groups may have special problems, it is against Negroes that the principal discriminatory practices are most prevalent.

"The City of Detroit Interracial Committee feels impelled to point out certain of these practices and to state what it believes to be sound principles in relation thereto.



"It is a fundamental principle in this country that all governmental activities and services and all private business should be conducted without discrimination on account of color, national origin or religious belief. The facts are, however, that this principle is constantly disregarded in the matter of housing by both government and private individuals.

"The following discriminatory practices in residential housing activities have been employed in Detroit and elsewhere:

1. Covenants restricting occupancy based on race are imposed on residential property by developers or groups of owners.

2. In the absence of such covenants, owners or occupiers of residential property by threats or acts of violence attempt to prevent occupancy of homes in their vicinity by persons of another race, creed or color.

3. Lending agencies reject legitimate loans because the borrower is of a race other than that established as the pattern of the neighborhood.

4. Real estate dealers, by agreement and a 'Code of Ethics', attempt to prevent occupancy by persons because of race, color or creed, and government agencies approve such practices.

5. In the redevelopment of blighted areas and in providing public housing, government agencies have recognized, approved and fortified such discriminatory practices.

"The chief sufferers from those practices are the Negro people. Housing for Negroes is utterly inadequate, Negroes are forced to live in overcrowded, substandard houses, and these conditions foster disease, delinquency and civic irresponsibility. A free market in housing and in land for housing does not exist. The home building industry and the dealers in homes seem to assume that the Negro popula-

tion can be housed in dwellings abandoned by whites, which is clearly not the case. They appear to disregard the fact that many Negroes are financially able to pay for much better homes than are generally available to them and the fact that the 'hand-me-down' houses of whites are not sufficient in number to fill the demand for Negro housing. Opportunities for expansion to vacant land are almost completely shut off to Negroes. The restrictive practices referred to above apply most effectively to vacant or thinly developed areas of the City and suburbs."

The Detroit Housing Commission arrived at the conclusion that the situation within the City of Detroit is such that the only solution for the Negro housing problem is in the opening of new unrestricted areas.<sup>32</sup>

The creation and growth of Negro slum areas with resulting high mortality, disease, delinquency and other social evils, have been due in large measure to the existence of restrictive covenants against Negroes which have prevented the normal development of Negro community life. As stated by Mr. James M. Haswell, Staff Writer for the Detroit Free Press on March 17, 1945 in a special feature article dealing with the Detroit housing situation:

"No substantial migration possible under present restriction patterns.

"Nobody knows how many hundreds of restrictive covenants and neighborhood agreements there are in Detroit binding property owners not to permit Negro occupancy. The number has increased greatly in response to the Negro search for new residence areas. There are said to be 150 associations of property owners promoting these agreements."

To the same effect is the comment of the Commissioner, Federal Public Housing Authority, Philip M. Klutznick, in

<sup>32</sup> Detroit Housing. Official Report to Mayor, December 12, 1944.

his article, *Public Housing Charts Its Course*, published in *Survey Graphic* for January, 1945:

"But the minority housing problem is not one of buildings alone. More than anything else it is a matter of finding space in which to put the buildings. Large groups of these people are being forced to live in tight pockets of slum areas where they increase at their own peril; they are denied the opportunity to spread out into new areas in the search for decent living.

"The opening of new areas of living to all minority groups is a community problem. And it is one of national concern."

This is not a new situation, but it is becoming more aggravated from year to year. One of the most discerning writers in this field clearly pointed out what was happening and its social dangers:

"Congestion comes about largely from conditions over which the Negroes have little control. They are crowded into segregated neighborhoods, are obliged to go there and nowhere else, and are subjected to vicious exploitation. Overcrowding saps the vitality and the moral vigor of those in the dense neighborhoods. The environment then, rather than hereditary traits, is a strong factor in increasing death-rates and moral disorders. Since the cost of sickness, death, immorality and crime is in part borne by municipal appropriations to hospitals, jails and courts, and in part by employers' losses through absence of employees, the entire community pays for conditions from which the exploiters of real estate profit."<sup>33</sup>

It is also widely recognized that these anti-social covenants are not characteristically the spontaneous product of

<sup>33</sup> Woofter, *Negro Problem In Cities* (1938), at page 95.

the community will but rather result from the pressures and calculated action of those who seek to exploit for their own gain residential segregation and its consequences.

"The riots of Chicago were preceded by the organization of a number of these associations (neighborhood protective associations); and an excellent report on their workings is to be found in *The Negro in Chicago*, the report of the Chicago Race Commission. The endeavor of such organizations is to pledge the property holders of the neighborhood not to sell or rent to Negroes, and to use all the possible pressures of boycott and ostracism in the endeavor to hold the status of the area. They often endeavor to bring pressure from banks against loans on Negro property in the neighborhood, and are sometimes successful in this.

"The danger in such associations lies in the tendency of unruly members to become inflamed and to resort to acts of violence. Although they are a usual phenomenon when neighborhoods are changing from white to Negro in northern cities, no record was found in this study where such an association had been successful in stopping the spread of a Negro neighborhood. The net results seem to have been a slight retardation in the rate of spread and the creation of a considerable amount of bitterness in the community."<sup>34</sup> Cf. Embree, *Brown Americans* (1943) at page 34 reporting 175 such organizations in Chicago alone.

The same thesis with reference to the City of Detroit was recently elaborated by Dr. Alfred M. Lee, Professor of Sociology at Wayne University:

"Emphasizing overcrowding and poor housing as one of the major causes of racial disturbances, Lee declared that in his opinion real estate dealers and

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<sup>34</sup> Wooster, *op. cit.*, p. 73.



agents have been doing more to stir up racial antagonisms in Detroit than any other single group.

" 'These men (real estate dealers),' Lee said, 'Are the ones who organize, promote and maintain restrictive covenants and discriminatory organizations. I am convinced that once it is possible to break the legality of these covenants, a great deal of our troubles will disappear.' " As reported in *The Michigan Chronicle* for May 9, 1945.

Other significant analyses of racial conflicts emphasize the evils of segregation and its contribution to tension and strife.

"But they [the Negroes] are isolated from the main body of whites, and mutual ignorance helps reinforce segregative attitudes and other forms of race prejudice." Myrdal, *An American Dilemma*, (1944) vol. 1, page 625.

"The Detroit riots of 1943 supplied dramatic evidence: rioting occurred in sections where white and Negro citizens faced each other across a color line, but not in sections where the two groups lived side by side." Good Neighbors, *Architectural Forum*, January 1946.

The dangers to society which are inherent in the restriction of members of minority groups to overcrowded slum areas are so great and are so well recognized that a court of equity, charged with maintaining the public interest, should not, through the exercise of the power given to it by the people, intensify so dangerous a situation. Therefore, in the light of public interest, the court below erred in granting the plaintiff's petition and ordering the defendants to move from their homes.

## **Conclusion**

In considering this question, it is immaterial that the restrictive covenants sought to be enforced are directed against Negroes. If valid for excluding Negroes, they would be equally valid and enforceable by injunction if directed against Jews, Catholics, Chinese, Mexicans or any other identifiable group. One might even envisage a similar discrimination against persons belonging to a political party--Republicans or Democrats--depending upon the prevailing opinion in the area.

Perhaps perpetual covenants against racial or religious minorities might not have been oppressive in frontier days, when there was a surplus of unappropriated land; but frontier days in America have passed. All the land is appropriated and owned. White people have the bulk of the land. Will they try to make provision for the irresistible demands of an expanding population, or will they blindly permit private individuals whose social vision is no broader than their personal prejudices to constrict the natural expansion of residential area until we reach the point where the irresistible force meets the immovable body?

For the reasons set forth above, it is respectfully requested that this Court issue a writ of certiorari as prayed for in the accompanying petition.

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IN THE  
**Supreme Court of the United States**  
October Term, 1947

**No. 87**

**ORSEL McGHEE and MINNIE S. McGHEE, his wife,**  
*Petitioners,*

*v.*

**BENJAMIN J. SIPES, and ANNA C. SIPES, JAMES  
A. COON and ADDIE A. COON, ET AL.,**  
*Respondents.*

**BRIEF FOR PETITIONERS**

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IN THE  
**Supreme Court of the United States**  
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ORSEL MCGHEE and MINNIE S. MCGHEE, his wife,  
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*Respondents.*

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**BRIEF FOR PETITIONERS**

**Opinion Below**

The opinion of the Supreme Court of the State of Michigan appears in the Record (R. 60-69) and is reported at 316 Mich. 614.

**Jurisdiction**

The jurisdiction of this Court is invoked under section 237b of the Judicial Code (28 U. S. C. 344b).

The date of judgment of the Supreme Court of the State of Michigan is January 7, 1947 (R. 70), and petitioners' motion for a rehearing was denied on March 3, 1947 (R. 80). A Petition for Certiorari was duly presented to this Court on May 10, 1947 and was granted by this Court on June 23, 1947 (R. 81).

## **Summary Statement of Matter Involved**

### **1. Statement of the Case**

In the Circuit Court of Wayne County, Michigan, in Chancery, the respondents herein sought and obtained a decree requiring the petitioners to move from property which they owned and which they were occupying as their home, and thereafter restraining them from using or occupying the premises, and further restraining petitioners from violating a race restrictive covenant upon such land, set forth more fully below (R. 52-53).

In their amended answer to the bill of complaint petitioners duly raised the defense that the enforcement by the court of such restrictive covenant would contravene the Fourteenth Amendment of the United States Constitution and that the restrictive covenant relied upon by the respondents was void as against public policy (R. 16-17). On appeal to the Supreme Court of the State of Michigan the petitioners' Reasons and Grounds of Appeal specifically assigned as errors of the lower court the holding that the enforcement of such restrictive covenant by a court of equity was not violative of the Fourteenth Amendment of the Constitution of the United States and that the race restrictive covenant was not void as against public policy (R. 5-6).

The Supreme Court of Michigan affirmed the decree entered by the trial court and in its opinion considered and adjudicated, in favor of the respondents, the issues raised (R. 60-69).

### **2. Statement of Facts**

Petitioners are citizens of the United States and are Negroes (R. 48, 53). They own and occupy as a residence

Lot 52 in Seebaldt's Subdivision of the City of Detroit, Michigan, commonly known as 4626 Seebaldt Avenue (R. 7). Respondents are the owners of lots in the same subdivision and an adjoining subdivision (R. 7). At various times during the year 1934 the predecessors in title of the petitioners and respondents had executed and recorded an instrument relating to their respective lots in such subdivisions, providing in its essential parts as follows:

"We, the undersigned, owners of the following described property:

Lot No. 52 Seebaldt's Sub. of Part of Joseph Tireman's Est.  $\frac{1}{4}$  Sec. 51 & 52 10 000 A T and Fr'l Sec. 3, T. 2S, R 11 E.

for the purpose of defining, recording, and carrying out the general plan of developing the subdivision which has been uniformly recognized and followed, do hereby agree that the following restriction be imposed on our property above described, to remain in force until January 1, 1960—to run with the land, and to be binding on our heirs, executors, and assigns:

"This property shall not be used or occupied by any person or persons except those of the Caucasian race.

"It is further agreed that this restriction shall not be effective unless at least eighty percent of the property fronting on both sides of the street in the block where our land is located is subjected to this or a similar restriction" (R. 42).

Such restriction was sought to be imposed upon 53 lots in the two subdivisions in which respondents reside (R. 34). Petitioners purchased their property from persons who did not sign the restrictive agreement (R. 13).



## Question Presented

*Does the enforcement by state courts of an agreement restricting the disposition of land by prohibiting its use and occupancy by members of unpopular minority groups, where neither the willing seller nor the willing purchaser was a party to the agreement imposing the restriction, violate the Fourteenth Amendment and treaty obligations under the United Nations Charter?*

## Errors Relied Upon

The Supreme Court of Michigan erred in holding:

1. That the due process clause of the 14th Amendment afforded petitioners no rights other than notice, a day in court and reasonable opportunity to appear and defend, and was not violated by the issuance of the injunction enforcing the race restrictive agreement (R. 65-66).
2. That court enforcement of the restriction in question does not violate the equal protection clause of the 14th Amendment, because "we have never applied the constitutional prohibition to private relations and private contracts" and that on the contrary to refuse to enforce the agreement would deny equal protection to the plaintiffs below (R. 66).
3. That the human rights provisions of United Nations Charter are "merely indicative of a desirable social trend and an objective devoutly to be desired by all well-thinking peoples." It is not "a principle of law that a treaty between sovereign nations is applicable to the contractual rights between citizens of the United States when a determination of these rights is sought in State courts" (R. 67).

## OUTLINE OF ARGUMENT

- I. Racial covenants restrictive of occupancy have developed through an uncritical distortion of doctrines concerning restrictions on use of property.
  - A. Historical development of devices restrictive of use of real property.
  - B. The distinction between restrictions upon the use of property and restrictions upon the occupancy of property by members of unpopular minority groups.
- II. The right to use and occupy real estate as a home is a civil right guaranteed and protected by the Constitution and laws of the United States.
  - A. Originating in ancient common law, this civil right is expressly protected by the Fourteenth Amendment and the Civil Rights Act.
  - B. This civil right includes the right to own, use and occupy real estate as a home.
- III. Under the Fourteenth Amendment no state may deny this civil right to any person solely because of his race, color, religion or national origin.
  - A. It is well settled that legislation conditioning the right to use and occupy property solely upon the basis of race, color, religion or national origin violates the Fourteenth Amendment.
  - B. A civil right guaranteed by the Fourteenth Amendment against invasion by a legislature is also protected against invasion by the judiciary.

**IV. Judicial enforcement of the racial restrictive covenant here involved is a denial by the State of Michigan of the petitioners' civil rights.**

- A. The decree below was based solely upon race.**
- B. It is the decree of the state court which denies petitioners the use and occupancy of their home.**
- C. Neither the existence of the restrictive agreement nor the fact that the state's action was taken in reference thereto alters in any way the state's responsibility under the Fourteenth Amendment for infringing a civil right.**

The fact that neither petitioners nor their grantors were parties to the covenant further emphasizes the state's responsible and predominant role in the action taken against them.

- D. Petitioners' right to relief in this case is not affected by the decision in *Corrigan v. Buckley*.**

**V. While no state-sanctioned discrimination can be consistent with the Fourteenth Amendment, the nation-wide destruction of human and economic values which results from racial residential segregation makes this form of discrimination peculiarly repugnant.**

- A. Judicial enforcement of restrictive covenants has created a uniform pattern of unprecedented overcrowding and congestion in the housing of Negroes and an appalling deterioration of their dwelling conditions. This extension and aggravation of slum conditions have in turn resulted in a serious rise in disease, crime, vice, racial tension and mob violence.**

B. There are no economic justifications for restrictive covenants against Negroes. Real property is not destroyed or depreciated solely by reason of Negro occupancy and large segments of the Negro population can afford to live in areas from which they are barred solely by such covenants. The sole reason for the enforcement of covenants are racial prejudice and the desire on the part of certain operators to exploit financially the artificial barriers created by covenants.

VI. Judicial enforcement of this restrictive covenant violates the treaty entered into between the United States and other members of the United Nations under which the agreement here sought to be enforced is void.

### Summary of Argument

Racial restrictive covenants of the type involved in this case have developed through the uncritical distortion of doctrines concerning restrictions on the use of property. Equitable enforcement of covenants restricting the use of land was an innovation introduced into the law of England, to accomplish socially desirable delimitations of the functions which might be carried on in particular areas. Such restrictions affected all persons equally and in the same way. During this century, however, equitably enforced restrictive covenants have been used in America for the new and entirely unrelated purpose of preventing the ownership and occupancy of homes by unpopular minority groups. The discriminatory effect of these latter day covenants and the absence of any resulting advantage to society prevent the earlier use covenants from affording any analogy justifying the enforcement of racial covenants restricting occupancy.



Beyond their lack of historical or analogical justification in the common law, the judicial enforcement of racial restrictive covenants infringes the civil right to use and occupy real property as a home without legally sanctioned racial impediments. The right freely to acquire and occupy land, early declared by Blackstone and other common law writers, survives today under protection of the Constitution and laws of the United States. After discussion in Congress, this right was expressly protected in the Civil Rights Act against all restrictions based on race. From the *Civil Rights Cases* to *Buchanan v. Warley*, this Court has protected the right of a willing buyer to acquire property from a willing seller and to use it freely as his own, without state imposed impediment based upon race, as a fundamental civil right protected by the Fourteenth Amendment.

While *Buchanan v. Warley* protected the right in question against infringement by statute and *Harmon v. Tylee* protected it against infringement by a combination of private action and statutory sanction, the rationale of these cases leaves no room for a different conclusion where judicial action in the absence of statute has accomplished the same result. In a growing body of analogous situations this Court has protected fundamental civil rights against judicial infringement.

The sole argument against applying a doctrine which struck down racial zoning statutes to the case at bar is based upon the fact that the court's action here is founded upon a private agreement. But the private agreement is not self-executing. The determination of the state to enforce the agreement involves the subordination of a fundamental civil right to considerations of public interest promoted by giving covenantors the benefit of their bargain. The obligations of the Fourteenth Amendment may not thus be diminished

or evaded. This Court has consistently so ruled in a variety of cases involving conflicts between fundamental civil rights on the one hand and various interests of property and public security on the other.

The significance of the private agreement is further minimized, and the role of the state as the effective engineer of discrimination is further emphasized by the fact that neither the petitioner grantees in this case nor their grantors were signers of the restrictive agreement. A special legal doctrine and an extraordinary application of state force were necessary to make effective the racial discrimination of which petitioners complain.

A vast amount of authoritative sociological data demonstrates that health, morals and safety are impaired on a national scale as a consequence of the widespread racial restrictive covenants. Property values are also impaired. Evils affecting the segregated minorities inevitably injure the community as a whole. Thus, although no state sanctioned discrimination can be consistent with the Fourteenth Amendment, the nationwide destruction of human and economic values which results from racial residential segregation makes this form of discrimination peculiarly repugnant.

The human rights provisions of the United Nations Charter, as treaty provisions, are the supreme law of the land and no citizen may lawfully enter into a contract in subversion of their purposes. The restrictive agreement here presented for enforcement falls within this proscription.

## ARGUMENT

### Preliminary Statement

In 1917, after the decision of this Court in *Buchanan v. Warley*, it could reasonably have been predicted that life in these United States would not be disfigured by the zoning of human beings. But seekers after legal means to accomplish what the Court had proscribed were persistent in their efforts to bring the ghetto to America, and courts, misled by the presumed license of *Corrigan v. Buckley*, have too often assisted them in doing so.

The areas affected have become so large and so numerous, the groups restricted so diverse, that the restrictive covenant today must be recognized as a matter of gravest national concern. Aspects of the problem have been litigated in at least twenty-one states during the last twenty years. These cases reveal covenants affecting areas as large as one thousand lots<sup>a</sup> and twenty-six city blocks.<sup>b</sup> These restrictions do not run only against Negroes. Courts have been asked to exclude from the ownership or occupancy of land persons of Arabian, Armenian, Chinese, Ethiopian, Greek, Hindu, Korean, Persian, Spanish and Syrian ancestry as well as American Indians, Hawaiians, Jews, Latin Americans and Puerto Ricans, irrespective of citizenship. A petition for certiorari now pending before this Court shows a clergyman excluded from occupancy of the parsonage of his church.<sup>c</sup> Such are the consequences of the restrictive covenant.

Surely, a device of unreason and bigotry cannot be permitted to destroy the essential character and oneness of America as a community,—“not while this Court sits.”

<sup>a</sup> *Mays v. Burgess*, 147 F. (2d) 869 (District of Columbia—1944).

<sup>b</sup> *Phillips v. Wearn*, 226 N. C. 290 (1946).

<sup>c</sup> *Trustees of the Monroe Avenue Church of Christ et al. v. Perkins et al.*, No. 153, October Term, 1947.

## **Racial Covenants Restrictive of Occupancy Have Developed Through an Uncritical Distortion of Doctrines Concerning Restrictions on Use of Property.**

Doctrines originating in and having proper application to limitations of *how* property shall be used have in recent years been distorted and unjustifiably applied to limitations of *who* shall occupy property.

### ***A. Historical Development of Devices Restrictive of the Use of Real Property.***

While the law relative to restrictions on the use of real property developed along lines historically different from those which led to the development of the doctrines relative to illegal restraints on alienation, the basic considerations of policy underlying each are essentially the same. A wise and ancient policy, which promotes those principles of law which permit the most beneficial use of the land resources of the country, is best served by allowing property to be freely alienable so that it may come into the hands of him who can best use it, and the same policy allows a person to put the property to the lawful use which he considers most advantageous.

The law has extended no greater favor to restrictions on the free use and enjoyment of land than to restrictions upon the free alienation of land. This is evidenced by the reluctance and, in some cases, the refusal, of courts to extend traditional devices or to create new devices whereby a more complete and simpler expedient for controlling use of another's land would be afforded.



The development of the law relative to restrictions on use is more obscure than that relative to restrictions on alienation. Two devices, perhaps, antedated the restrictive covenant. An owner of land might convey a part thereof subject to a condition subsequent that the land conveyed should not be used in a particular manner so as to affect the part retained, upon breach of which condition the conveyor might exercise his power to terminate the grantee's estate. Or the owner of one parcel might acquire by grant or reservation an easement restricting uses to be made upon another parcel. Neither could accomplish a restriction of land use save within narrow limits.

Covenants respecting the use of land developed slowly, and within similarly circumscribed areas. Enforcement in the law courts of covenants, except as between the parties thereto, was a deviation from the common law rules that a chose in action was nonassignable, and that only a party to a contract can be held liable thereon.<sup>2</sup>

It appears that prior to the middle of the sixteenth century, both the benefit and burden of a covenant contained in a lease ran to an assignee of the leasehold, so that the as-

<sup>1</sup> Both devices necessitated an instrument under seal. The power of termination for breach of condition could neither be assigned *inter vivos* nor devised, and easements the benefit of which was in gross did not run either as to benefit or burden. Common law easements could be created only in a limited class of cases, the law not favoring the creation of new forms of easements not known to the early law. Neither device was afforded a remedy by which actual or literal performance of the restriction could be judicially compelled. Stone, *Equitable Rights and Liabilities of Strangers to a Contract*, 18 COL. L. REV. 291-293.

<sup>2</sup> "The terms 'real covenants' or 'covenants running with the land' are of course metaphorical. The covenants are always personal in the sense that they are enforced in personal actions for damages, etc.; and they cannot actually run with the land as Coke seemed to think; the question is merely how far the transfer of an interest in land will also transfer either the benefit or the burden of covenants concerning it." CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND, 73.

signee of the lessee might be held liable on the covenant, and became entitled to enforce it. But, neither the benefit of the covenant passed to, nor the burden of the covenant was imposed upon, the assignee of the reversion.<sup>3</sup> In 1540, the Statute of Covenants<sup>4</sup> declared that lessors and their assigns should have the right to enforce covenants and conditions against lessees and their assigns, and conferred reciprocal rights upon lessees and their assigns to enforce covenants against lessors and their assigns.<sup>5</sup> Limitations upon the running of such covenants were imposed in *Spencer's case*,<sup>6</sup> which declared that the covenant must "touch or concern" the land demised, otherwise it would not run, and that even though the covenant touched or concerned the land, if it concerned likewise a thing which was not in being at the time of the demise, but which was to be built or created thereafter, assignees would not be bound unless they were expressly mentioned.<sup>7</sup> Where the covenant was made between owners in fee simple, not in connection with a lease, the additional requirement of "privity of

<sup>3</sup> 1 Wms. Saunders, (1st Am. ed.) 240a, n. 3; 1 SMITH'S LEADING CASES (8th ed.) 150; 1 TIFFANY, LANDLORD & TENANT, 968-969.

<sup>4</sup> 32 Hen. VIII, c. 34 (1540).

<sup>5</sup> This statute was not enacted entirely out of a desire to broaden the covenant device. "The reason for the enactment of the statute was that the monasteries and other religious and ecclesiastical houses had been dissolved and their lands had come into the possession of the king, who distributed them to the lords. Much of the lands was subject to leases when they fell into the hands of the king, and the monks had inherited in leases various covenants and provisions for their benefit and advantage. At the common law no person could take the benefit of any covenant or condition except such as were parties or privies thereto, so that the grantees of the king could not enforce the covenants in the leases. These things were recited in the preamble, and the statute was enacted to give to the grantees of the king the same remedies that the original lessors might have had." *Purvis v. Shuman*, 273 Ill. 286, 112 N. E. 679 (1916).

<sup>6</sup> 5 Coke 16.

<sup>7</sup> These limitations caused no little confusion in the law. CLARK, *op. cit. supra* note 8, 74 *et seq.*

estate" must be satisfied<sup>8</sup> and, even when all requirements were satisfied, the English courts refused to permit the running of the burden of such a covenant so as to be enforceable against a transferee of the land.<sup>9</sup> Until equity commenced the exercise of its peculiar powers in the covenant field, the sole remedy in event of breach was, of course, an action for damages.

Prior to the middle of the nineteenth century, covenants not to use land in a particular manner were specifically enforceable in equity by injunction against the promisor where the requisite inadequacy of a legal remedy existed.<sup>10</sup> New developments followed the decision in 1848 in *Tulk v. Moxhay*,<sup>11</sup> which established that a covenant as to the use of land might affect a subsequent purchaser who takes with notice thereof, equity in such cases enjoining a use of the land in violation of the covenant.<sup>12</sup> The requirements of touching and concerning privity of estate were swept aside<sup>13</sup> and a more workable restrictive device created.

With the urbanization of the population, and the more crowded conditions of modern life, the desire to secure suit-

<sup>8</sup> Here again the requirement was not exact, and divergent views followed. CLARK, *op. cit. supra* note 8, 91 *et seq.*

<sup>9</sup> *Austerberry v. Oldham*, 29 Ch. D. 750; CLARK, *op. cit. supra* note 8, 113; 3 TIFFANY, REAL PROPERTY (3rd ed.) 445.

<sup>10</sup> *Martin v. Nutkin*, 2 P. Wms. 266; *Lord Grey v. Saxon*, 6 Ves. 106.

<sup>11</sup> 2 Phil. 774, 41 Eng. Rep. 1143.

<sup>12</sup> Whether these restrictions are enforced as contracts concerning the land, or as servitudes or easements on the land, is still a subject of speculation. The opposing theories are analyzed in CLARK, *op. cit. supra* note 8, 149 *et seq.*

<sup>13</sup> CLARK, *op. cit. supra* note 8, 150.

able home surroundings led to a demand for real estate limited solely to development for residential purposes. This natural desire of householders has been exploited by land developers and realtors so that the restriction of particular areas of property in or near American cities to residential use is now becoming the rule rather than the exception. The legal machinery to achieve this end has been found in the main not in the ancient rules of easements or covenants enforceable only at law, but in the activities of courts of equity in enforcing restrictions as to use of land when reasonable. Within its historical framework, the covenant enforceable in equity has thus achieved widespread success and popularity as a device capable of accomplishing a measurable control over uses to which a neighbor's land might be put. Its accomplishments in this wise advanced the public weal by promoting healthier, safer and morally superior residential areas through specialization of use activities upon propinquous lands. Such limited use restrictions were accomplished without entrenchment upon the tenet of individual freedom of use and enjoyment of property.

***B. The Distinction Between Restrictions Upon the Use of Property and Restrictions Upon the Occupancy of Property by Members of Unpopular Minority Groups.***

From its inception until the wane of the last century, the restrictive covenant enforceable in equity was always and only an agent selective of the type of use which might be made of another's land. Neither the history of its development nor the economic or social justifications for its judicial enforcement disclose a basis for its employment as a racially discriminatory preventive of occupancy. This novel twist in the law was introduced by historical acci-



dent,<sup>14</sup> and has survived only because of judicial indifference toward the consequent distortion of fundamental concepts and principles and the economic and social havoc thereby wrought:

1. The distinction between restrictions on use and those on occupancy is fundamental, but is completely ignored. The concept of use restrictions before the birth of racial restrictive covenants had been, and with their sole exception, still is in terms of type of structure or type of activity upon the land. Property was left open to occupancy by any person, including him who engaged in the inhibited activity in another place. The distinction is between who occupies the land, and what he does with it. Restrictions against manufacturing uses prevented the operation of factories on the restricted land, but industrialists and employees might nevertheless establish their residences there; those against taverns, gambling dens and houses of prostitution did not prohibit occupancy by tavernkeepers, gamblers and prostitutes who plied their trade elsewhere.

2. The cases enforcing nonracial covenants dealt with restrictions possessing the equality of personal application implicit in reasonableness. Race or other personal

<sup>14</sup> The law relative to the enforceability in equity of racial restrictions against occupancy stems from *Los Angeles Investment Co. v. Gary*, 181 Cal. 680, 186 P. 596 (1918), which followed two years behind *Buchanan v. Warley*. The decision was 3-2 and, as the court expressed in its opinion, it was not "favored by either brief or argument on behalf of the respondents." (186 Cal. 681) the Negro occupants. The restriction was sought to be imposed by condition subsequent, rather than by covenant, and the court pointed out that "what we have said applies only to restraints on use imposed by way of condition and not to those sought to be imposed by covenant merely. The distinction between conditions and covenants is a decided one and the principles applicable quite different." (Id., 683). Nevertheless, and notwithstanding the fallacy in analogizing a restriction on occupancy to one on use, courts subsequently faced with the racial occupancy covenant followed the lead supplied by this case.

considerations could not be factors in such an equation; only type of use could be important. All persons, irrespective of race, were alike bound by the restriction and alike free to make any unrestricted use of the land. Irrespective of race, every owner of the restricted land possessed a perfect privilege to put the land to any use uninhibited by the covenant; nor was race ever an exemption from the operation of the restriction for, irrespective of race, every owner of the restricted land was bound to observe the restriction. Racial covenants, however, ignore all reasonable considerations and ground their discriminations pointedly on race alone.

3. Nonracial covenants effected only prohibitions which accorded with the public good. The proscribed uses were usually illegal, immoral, or unsafe to the community. Many constituted indictable offenses or abateable nuisances. All were of such character that they could better be conducted elsewhere. The same prohibitions could be, and frequently were, effected by legislation.<sup>15</sup> But occupancy of land by members of unpopular minority groups does not fall within the above categories.<sup>16</sup> The absence of all relation to the public health, morals, safety or general welfare precludes its prohibition by statute.<sup>17</sup>

<sup>15</sup> *Standard Oil Co. v. Marysville*, 279 U. S. 582; *Gorrie v. Fox*, 274 U. S. 603; *Zahn v. Board of Public Works*, 274 U. S. 325; *Euclid v. Ambler Realty Co.*, 272 U. S. 365; *St. Louis Poster Advertising Co. v. St. Louis*, 249 U. S. 269; *Pierce Oil Co. v. Hope*, 248 U. S. 498; *Thomas Cusack Co. v. Chicago*, 242 U. S. 526; *Northwestern Laundry Co. v. Des Moines*, 239 U. S. 486; *Hadacheck v. Sebastian*, 239 U. S. 394; *Reinman v. Little Rock*, 237 U. S. 171; *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358; *Welch v. Swasey*, 214 U. S. 91; *Bacon v. Walker*, 204 U. S. 311; *Fischer v. St. Louis*, 194 U. S. 361.

<sup>16</sup> *Buchanan v. Warley*, 245 U. S. 60; *Harmon v. Tyler*, 273 U. S. 668; *City of Richmond v. O'Leary*, 281 U. S. 704; *Crist v. Henshaw*, 196 Okl. 168 (1945).

<sup>17</sup> See Point V of this brief.

4. Nonracial covenants did not subvert individual rights of property. They affected only a single constituent of property—use; all other attributes of property, including occupancy, retained their traditional freedom. The curtailment in freedom of user thus effected was a compromise justified by the benefit flowing from the reconciliation of the innumerable and conflicting freedoms of use possessed by others. Racial covenants destroy the essence of property; they represent an obliteration, not a compromise.

5. Nonracial covenants drew the substance of their validity from their purpose and effect as engines of superior residential areas. Racial occupancy restrictions cannot reasonably be considered as improving the health, morals, safety or general welfare of the occupants of the restricted area.<sup>18</sup> On the contrary, and at the same time, their cumulative economic and social effects have impaired the health, morals, safety and general welfare of all.<sup>19</sup>

Such use of land as is characteristically proscribed by nonracial restrictive covenants is likely to constitute a serious injury to the neighboring landowner and a matter of concern to the state. But in our democratic society the skin color, national origin or religion of the occupant of property cannot be a legal injury to a neighbor or a matter of concern to the state.

The constitutional consequence of the foregoing distinctions is that this Court has upheld state statutes imposing various reasonable restrictions on use<sup>20</sup> but, beginning with *Buchanan v. Warley*, has uncompromisingly struck down every effort of the states to impose racial residential restrictions by legislation.<sup>21</sup> That conclusion was inevitable.

<sup>18</sup> See cases cited in footnote 16 *supra*.

<sup>19</sup> See Point V of this brief.

<sup>20</sup> See cases cited in footnote 15 *supra*.

<sup>21</sup> See cases cited in footnote 16 *supra*.

## II

## **The Right to Use and Occupy Real Estate as a Home is a Civil Right Guaranteed and Protected by the Constitution and Laws of the United States.**

Blackstone pointed out that the third absolute right "is that of property, which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."<sup>22</sup> This right is expressly protected by the Fourteenth Amendment and the Civil Rights Acts<sup>23</sup> against invasion by the states on racial grounds.

The Congressional debates after the adoption of the Thirteenth Amendment and preceding the enactment of the Civil Rights Act of 1866 show that Congress intended to protect the fundamental civil rights of the freedmen. High on the list of rights to be protected was the right to own property. Some doubts were expressed by the opponents of the measure as to its constitutionality, and particularly the right of Congress to confer citizenship upon the former slaves without an amendment.<sup>24</sup> But neither the proponents of the Civil Rights Act nor its opponents doubted that citizens of the United States had an inherent right to acquire, own and occupy property.<sup>25</sup> After the enactment of the Fourteenth Amendment, Congress reenacted the Civil

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<sup>22</sup> Blackstone's Commentaries, p. 138.

<sup>23</sup> See: 8 U. S. C. 42.

<sup>24</sup> Flack, Adoption of the Fourteenth Amendment (John Hopkins Press, 1908), p. 21.

<sup>25</sup> See: Debate between Senators Cowan and Trumbull, Congressional Globe, 39th Cong., 1st Session, Part 1, pp. 499-500.



Rights Act with a few modifications, expressly stipulating therein:

"All citizens of the United States shall have the same right in every State and Territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."<sup>26</sup>

Throughout the debates on the Amendment and the Civil Rights Bill there is a clear perception that freedom for the former slave without protection of his fundamental right to own real or personal property was meaningless. One of the Senators cited as an example of the oppression from which the freedmen must be protected the fact that in 1866 in Georgia "if a black man sleeps in a house overnight, it is only by leave of a white man,"<sup>27</sup> and another asked: "Is a freeman to be deprived of the right of acquiring property, having a family, a wife, children, home?"<sup>28</sup>

In 1879 this Court construed the Fourteenth Amendment as containing a positive immunity for the newly freed slaves against "legal discriminations . . . lessening the security of their enjoyment of the rights which others enjoy"<sup>29</sup> and in 1917 this Court construed the Civil Rights Act as dealing "with those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color."<sup>30</sup>

In the *Civil Rights Cases* this Court, while holding that sections of the Civil Rights Act were unconstitutional

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<sup>26</sup> 8 U. S. C. 42.

<sup>27</sup> Congressional Globe, 39th Cong., 1st Session, Part 1, p. 589.

<sup>28</sup> Senator Howard, *Ibid.*, p. 504.

<sup>29</sup> *Strauder v. West Virginia*, 100 U. S. 303, 308.

<sup>30</sup> *Buchanan v. Warley*, 245 U. S. 60, 79.

because they applied to individual action, at the same time emphasized the application of the Fourteenth Amendment to state action of all types, whether legislative, judicial or executive.

"In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs or judicial or executive proceedings."<sup>31</sup>

It was thus made clear that the Fourteenth Amendment does prohibit the wrongful acts of individuals where supported "by state authority in the shape of laws, customs, or *judicial* or executive proceedings." (Italics ours.)

Among the rights listed as protected against legislative, judicial and executive action of the states was the right "to hold property, to buy and to sell."

The right that petitioners assert is their civil right to occupy their property as a home—the same right recognized by this Court in *Buchanan v. Warley*:

"The Fourteenth Amendment protects life, liberty, and property from invasion by the States without due process of law. Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property • • •"<sup>32</sup>

In the instant case the respondents seek by means of state court action to evict petitioners from the property they own and are occupying as a home. On the face of the

<sup>31</sup> 109 U. S. 3, 17.

<sup>32</sup> 245 U. S. 60, 74.

pleadings they do not seek to divest petitioners of title. But the effect of denying to petitioners the right to occupy their property as a home in a residential neighborhood, under any circumstances, is a denial of the civil right set out above.

### III

#### **Under the Fourteenth Amendment, No State May Deny This Civil Right to Any Person Solely Because of His Race, Color, Religion, or National Origin.**

##### ***A. It is Well Settled That Legislation Conditioning the Right to Use and Occupy Property Solely Upon the Basis of Race, Color, Religion, or National Origin Violates the Fourteenth Amendment.***

Racial restrictions by states of the right to acquire, use, and dispose of property are in direct conflict with the Constitution of the United States. The first efforts to establish racial residential segregation were by means of municipal ordinances attempting to establish racial zones. This Court, in three different cases, has clearly established the principle that the purchase, occupancy, and sale of property may not be inhibited by the states solely because of the race or color of the proposed occupant of the premises.<sup>33</sup>

In *Buchanan v. Warley*, *supra*, an ordinance of the City of Louisville, Kentucky, prohibited the occupancy of lots by colored persons in blocks where a majority of the residences were occupied by white persons and contained the same

<sup>33</sup> *City of Richmond v. Deans*, 281 U. S. 704; *Harmon v. Tyler*, 273 U. S. 668; *Buchanan v. Warley*, 245 U. S. 60.

prohibition as to white persons in blocks where the majority of houses were occupied by colored persons. Buchanan brought an action for specific enforcement of a contract of sale against Warley, a Negro, who set up as a defense a provision in the contract excusing him from performance unless he should have the right under the laws of Kentucky and of Louisville to occupy the property as a residence and contended that the ordinance prevented him from occupying the property. Buchanan replied that the ordinance was in violation of the Fourteenth Amendment.

In a unanimous opinion by Mr. Justice Day, this Court decided the following question:

"The concrete question here is: May the occupancy, and, necessarily, the purchase and sale of property of which occupancy is an incident, be inhibited by the states, or by one of its municipalities, solely because of the color of the proposed occupant of the premises? That one may dispose of his property, subject only to the control of lawful enactments curtailing that right in the public interest, must be conceded. The question now presented makes it pertinent to inquire into the constitutional right of the white man to sell his property to a colored man, having in view the legal status of the purchaser and occupant" (245 U. S. 60, at p. 75).

The decision in the *Buchanan* case disposed of all of the arguments seeking to establish the right of a state to restrict the sale of property by excluding prospective occupants because of race or color:

*Use and occupancy is an integral element of ownership of property:*

" \* \* \* Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it.



The Constitution protects these essential attributes of 'property.' *Holden v. Hardy*, 169 U. S. 366, 391, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383. Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land. 1 Cooley's Bl. Com. 127." (245 U. S. 60, at p. 74.)

*Racial residential legislation can not be justified as a proper exercise of police power:*

"We pass, then, to a consideration of the case upon its merits. This ordinance prevents the occupancy of a lot in the city of Louisville by a person of color in a block where the greater number of residences are occupied by white persons; where such a majority exists, colored persons are excluded. This interdiction is based wholly upon color; simply that, and nothing more . . .

"This drastic measure is sought to be justified under the authority of the state in the exercise of the police power. It is said such legislation tends to promote the public peace by preventing racial conflicts; that it tends to maintain racial purity; that it prevents the deterioration of property owned and occupied by white people, which deterioration, it is contended, is sure to follow the occupancy of adjacent premises by persons of color.

"It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." (245 U. S. 60, at p. 81.)

*Race is not a measure of depreciation of property:*

"It is said that such acquisitions by colored persons depreciate property owned in the neighborhood

by white persons. But property may be acquired by undesirable white neighbors; or put to disagreeable though lawful uses with like results." (245 U. S. 60, at p. 82.)

The issue of residential segregation on the basis of race was squarely met and disposed of in the *Buchanan*-case. Each of the arguments in favor of racial segregation was carefully considered and this Court, in determining the conflict of these purposes with our Constitution, concluded:

"That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges." (245 U. S. 60, at pp. 80-81.)

The determination of this Court to invalidate racial residential segregation by state action regardless of the alleged justification for such action is clear from two later cases.

In the case of *City of Richmond v. Deans*, a Negro who held a contract to purchase property brought an action in the United States District Court seeking to enjoin the enforcement of an ordinance prohibiting persons from using as a residence any building on a street where the majority of the residences were occupied by those whom they were forbidden to marry under Virginia's Miscegenation Statute. The Circuit Court of Appeals, in affirming the judgment of the trial court, pointed out: "Attempt is made to distinguish the case at bar from these cases on the ground that the zoning ordinance here under consideration bases its interdiction on the legal prohibition of intermarriage and not on race or color; but, as the legal prohibition of intermarriage is itself based on race, the question here, in final analysis, is identical with that which the Supreme Court

has twice decided in the cases cited. [*Buchanan v. Warley* and *Harmon v. Tyler.*]<sup>34</sup> This Court affirmed this judgment by a *Per Curiam* decision.<sup>35</sup>

The principles of the *Buchanan* case have also been applied in cases involving the action of the legislature coupled with the failure of individuals to act. In *Harmon v. Tyler*, a Louisiana statute purported to confer upon all municipalities the authority to enact segregation laws, and another statute of that state made it unlawful in municipalities having a population of more than 25,000 for any white person to establish his residence on any property located in a Negro community without the written consent of a majority of the Negro inhabitants thereof, or for any Negro to establish his residence on any property located in a white community without the written consent of a majority of the white persons inhabiting the community.

An ordinance of the City of New Orleans made it unlawful for a Negro to establish his residence in a white community, or for a white person to establish his residence in a Negro community, without the written consent of a majority of the persons of the opposite race inhabiting the community in question. Plaintiff, alleging that defendant was about to rent a portion of his property in a community inhabited principally by white persons to Negro tenants without the consent required by the statute and the ordinance, prayed for a rule to show cause why the same should not be restrained.

Defendant contended that the statutes and the ordinance were violative of the due process clause of the Fourteenth Amendment. The trial court sustained defendant's position. On appeal, the Supreme Court of Louisiana reversed,

<sup>34</sup> *City of Richmond v. Deans*, C. C. A.—4th, 37 F. (2d) 712, 713.

<sup>35</sup> 281 U. S. 704.

and upheld the legislation. On appeal to this Court, the decision of the Supreme Court of Louisiana was reversed on authority of *Buchanan v. Warley*. A like disposition of the same legislation was had in the Circuit Court of Appeals for the Fifth Circuit in an independent case.

In the instant case, all of the alleged evils claimed to flow from mixed residential areas which are relied upon for judicial enforcement of racial restrictive covenants were advanced in the *Buchanan* and the other two cases as justification for legislative action to enforce residential segregation. In the *Buchanan* case, this Court dealt with each of the assumed evils and held that they could not be solved by segregated residential areas and did not warrant the type of remedy sought to be justified. Efforts to circumvent this decision have been summarily disposed of by this Court.<sup>36</sup>

The right petitioners here assert is the civil right to occupy their property as a home—the same right which was recognized and enforced in *Buchanan v. Warley*.

**B. Civil Rights Are Guaranteed by the Fourteenth Amendment Against Invasion by the Judiciary.**

It is equally well settled that the limitations of the Fourteenth Amendment apply to the exercise of state authority by the judiciary. As long ago as 1879, in *Ex Parte Virginia*,<sup>37</sup> this Court specifically recognized that the judiciary enjoyed no immunity from compliance with the requirements of the Fourteenth Amendment. In that case the state judge was held to be subject to the federal Civil Rights Act, despite the plea that in selecting a jury in a manner which excluded otherwise qualified persons solely on account of their color, the judge was exercising a function of his judicial

<sup>36</sup> *Harmon v. Tyler and City of Richmond v. Deans*, *supra*.

<sup>37</sup> 100 U. S. 339.



office. In an unbroken line of precedents since that time, this Court has again and again reaffirmed this proposition. For example, in *Twining v. New Jersey*,<sup>38</sup> this Court said:

"The law of the state, as declared in the case at bar, which accords with other decisions . . . permitted such an inference to be drawn. The judicial act of the highest court of the state, in authoritatively construing and enforcing its laws, is the act of the state. . . . The general question, therefore, is, whether such a law violates the Fourteenth Amendment, either by abridging the privileges or immunities of citizens of the United States, or by depriving persons of their life, liberty or property without due process of law." (211 U. S. 78, at pp. 90-91.)

It is readily conceded that the "law" to which the Court there referred was actually one of a series of rules, common law as well as statutory, which had been developed by the state authority, legislative and judicial, for the conduct of criminal trials. So classified, the opinion demonstrates the complete acceptance by this Court of the proposition originally announced in *Ex Parte Virginia*, that the procedure of state courts, whether provided by legislation or rule of decision by state courts, must meet the requirements and limitations of the Fourteenth Amendment.<sup>39</sup>

The obligation of the state judiciary to comply with the limitations of the Fourteenth Amendment, however, is not confined to procedure. On the contrary this Court has frequently tested decisions of state courts on matters of substantive law against the requirements of the federal Consti-

<sup>38</sup> 211 U. S. 78.

<sup>39</sup> See also: *Hysler v. Florida*, 315 U. S. 411; *Brown, Ellington & Shields v. Mississippi*, 297 U. S. 278; *Moore v. Dempsey*, 261 U. S. 86; *Norris v. Alabama*, 294 U. S. 587; *Powell v. Alabama*, 287 U. S. 45; *Brinkerhoff Faris Co. v. Hill*, 281 U. S. 673; *Carter v. Texas*, 177 U. S. 442.

tution and has equally frequently recognized that it was obliged so to do by the Fourteenth Amendment. This is aptly demonstrated by the opinion of this Court in *Cantwell v. Connecticut*.<sup>40</sup> In that case, it will be remembered, the petitioner had been convicted on an indictment which contained four counts charging violation of express statutory prohibitions, and a fifth count which charged a common law breach of the peace. The petitioner contended in applying for certiorari that his conviction on each of these counts violated the Fourteenth Amendment. This Court recognized that both the express statutory provisions and the substantive determination of the common law obligation by the state court raised similar constitutional questions under the Fourteenth Amendment. In fact, this Court stated:

"Since the conviction on the fifth count was not based upon a statute, but presents a substantial question under the federal Constitution, we granted the writ of certiorari in respect of it." (310 U. S. 266 at p. 301.)

Again, at pp. 307-308:

"Decision as to the lawfulness of the conviction (on the fifth count) demands the weighing of two conflicting interests. The fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged. The state of Connecticut has an obvious interest in the preservation and protection of peace and good order within her borders. We must determine whether the alleged protection of the State's interest, means to which end would, in the absence of limitation by the federal Constitution, lie wholly within the State's discretion, has been pressed, in this instance, to a point where it has come into fatal

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<sup>40</sup> 310 U. S. 296.

collision with the overriding interest protected by the federal compact."

At the next term this Court, even more forcibly enunciated the requirement that decisions by state courts on substantive matters satisfy the requirements of due process. In *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc.*,<sup>41</sup> this Court granted certiorari to review an injunction of an Illinois court issued on the authority of that state's common law which prohibited picketing, peaceful and otherwise, by a labor union. Despite a disagreement among the members of the Court as to the end result, it was agreed by all of the justices that the injunction had to be tested against the limitations of the Fourteenth Amendment with respect to the protection of freedom of speech. The majority, speaking through Mr. Justice FRANKFURTER, was of the opinion that the violence which had occurred outside of the picket line during the particular labor dispute was sufficient ground to justify the Illinois court in enjoining picketing, although admittedly the injunction deprived the trade union of its right to disseminate information with respect to the labor dispute.

The dissent voiced by Mr. Justice BLACK addressed itself to the propriety of limiting the right of free speech because of violence not directly shown to have occurred in connection with the picketing. Both majority and minority, however, applied to the injunction the test of the Fourteenth Amendment. The unanimity in this Court on that proposition was plainly manifested when on the same day a unanimous Court again in *American Federation of Labor v. Swing*,<sup>42</sup> tested another Illinois injunction, also issued on the authority of the common law of that state, which restrained peaceful picketing on the ground that the labor dispute was

<sup>41</sup> 312 U. S. 287.

<sup>42</sup> 312 U. S. 321.

not one between the complaining employers and his employees. Measured in terms of the Fourteenth Amendment, the Court concluded that this was an unlawful interference by the state with the right of free speech of the members of the trade union involved.<sup>43</sup>

So strong is this Court's determination to protect fundamental rights against invasion by the state judiciary that even in criminal contempt cases it has tested the validity of such convictions against the requirements of the Fourteenth Amendment. Thus, in *Bridges v. State of California*,<sup>44</sup> the majority of the Court was of the opinion that punishment of a trade union official and newspaper for contempt because of out of court statements, which had been made with respect to litigation pending in the state court, was a violation of the Fourteenth Amendment because it was an unwarranted interference with the right of free speech. The minority, disagreeing with respect to the unreasonableness of the state's action, readily agreed that the conviction had to be tested against the limitations of the Fourteenth Amendment.

Thus, both on analysis and on authority, it is plain that the acts of state courts are those of the state itself within the meaning of the limitations of the Fourteenth Amend-

<sup>43</sup> It is significant that in the *M. J. Downmoor* case, even the majority recognized that if the effect of the violence, which they deemed to be controlling on the constitutional issue should be shown to have been dissipated, the Fourteenth Amendment would require that the State court dissolve the injunction there approved. To the same effect see *Bakery Drivers Local v. Wohl*, 315 U. S. 769. See also *Cafeteria Employees Union, Local 302 v. Angelos*, 320 U. S. 293, 294, where it was said, "We brought these two cases here to determine whether injunctions sanctioned by the New York Court of Appeals exceeded the bounds within which the 14th Amendment confines State power." It should be noticed that neither of the cases referred to have the State court relied on more for the common law authority for the issuance of the injunction.

<sup>44</sup> 314 U. S. 252.



ment. Any other conclusion in a common law system would be untenable. For, to the extent that the decisions of courts serve as authoritative precepts regulatory of conduct beyond the case in litigation, no logical distinction can be drawn between the acts of the legislature and the decisions of the court. The creative role of the judiciary as a source of law to meet the demands of society by filling the interstices between precedents, and between precedent and legislation has long been recognized.<sup>45</sup> Where this Court is required to review the constitutionality of State law, it is plain that:

"Whether the law of the State shall be declared by its legislature in a statute or by its highest court in a decision, is not a matter of Federal concern."<sup>46</sup>

#### IV

### **Judicial Enforcement of the Racial Restrictive Covenant Here Involved is a Denial by the State of Michigan of the Petitioners' Rights Under the Fourteenth Amendment.**

#### **A. The Decree of the State Court Was Based Solely on the Race of Petitioners.**

Even a cursory examination of the record discloses that the controlling operative fact relied upon by the state court to justify ouster of petitioners from their home was their race.<sup>47</sup>

<sup>45</sup> Cardozo, *The Judge as a Legislator*, *The Nature of Judicial Process*; Arthur L. Corbin, 29 *YALE L. JOURNAL* 771; See Swiss Code, quoted by Cardozo, *op. cit.* 140.

<sup>46</sup> *Erie v. Tompkins*, 304 U. S. 64.

<sup>47</sup> Interesting enough the finding of race was based solely on evidence with respect to color (R. 22).

Pleadings, proceedings, and the opinion of the State Supreme Court all demonstrate that under the law of the state precedent required petitioners' eviction if, and only if, they were found to be of other than "the Caucasian race".<sup>48</sup> If the trial court had made the determination that petitioners were Caucasians, they would be occupying their home peacefully without threat of eviction.

At this period in the history of the United States, it is no longer necessary to demonstrate that state action which discriminates because of the race, color, religion or national origin of persons subject to the state jurisdiction violates the Fourteenth Amendment.

***B. It is the Decree of the State Court Which Denies Petitioners the Use and Occupancy of their Home.***

The foregoing authorities and analysis were urged upon the highest court of Michigan in this case. Nevertheless, that court refused to recognize its obligation to make a decision which conformed to the requirements of the Fourteenth Amendment in other than procedural matters. The court stated:

"While we recognize that the concept of 'due process' is incapable of exact definition, yet, ever since *Buck v. Sherman*, 2 Doug. 176, we have held that this constitutional right means that every person having property rights affected by litigation is entitled to notice, and a day in court, or a reasonable opportunity to appear and defend his interest. . . . Such rights

<sup>48</sup> The complaint alleged that the petitioners were of "the Negro race" (R. 8); the answer denied knowledge of their ancestry but demanded strict proof (R. 10); evidence on both sides of this issue was heard and the trial court made a specific finding with respect to the matter (R. 53) found to be adequate by the State Supreme Court (R. 61).

were accorded the defendants in the instant case" (R. 65-66).

Not only on the basis of sound legal analysis is this Court obliged to test the decree of the state court in this case against the limitations of the Fourteenth Amendment, but the facts and surrounding circumstances dictate the necessity of such an inquiry, because it is the action of the court which will deprive the petitioners of their right to occupy their property as a home.

It has already been shown that during the year 1934 certain residents and holders of title to property located in Seebaldt's Subdivision of the City of Detroit agreed that:

"This property shall not be used or occupied by any person or persons except those of the Caucasian race."

Subsequently, as is the usual case in connection with urban property, title to some of the fifty-three lots sought to be covered by this restrictive agreement passed into the hands of persons other than the original signers of the restrictive agreement. One such person, for reasons neither appearing in the record nor material to the issue here, conveyed title to Lot 52 to petitioners, fully complying with all of the requirements of the law of Michigan with respect to the transfer of title in fee to that piece of property.<sup>49</sup>

Thereafter petitioners and their family moved into the dwelling and occupied the premises as their home. Subsequently, other signers of the restrictive agreement, or

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<sup>49</sup> It is admitted that the federal constitution did not preclude the owner of any piece of property sought to be covered by such an agreement from freely picking and choosing among the persons whom he would permit to use or occupy his property as guests, lessees or purchasers on the basis of race, religion, color, personality, education, occupation or on the basis of absolute whim and utter caprice.

persons privy thereto, instituted the present action to evict petitioners from their home. Thus, the mere existence of the agreement was not sufficient to prevent petitioners and their family from making their home in these premises. Instead, respondents sought the aid of state authority to accomplish the purpose which they had been unable to effect by the execution of the restrictive agreement.

Theoretically, there were four other alternative courses which respondents or some of them could have taken. They might have sought to persuade petitioners to move out, and the record shows that an attempt in this direction was made (R. 22). It was unsuccessful. There was, of course, nothing unlawful about such conduct, nor did it raise any constitutional question, since truly this was the conduct of individuals with respect to other individuals.

As a second alternative they might have used force or threats of force to cause petitioners to move out. There can be no doubt but that this course would have brought down upon respondents the full force of the state authority to prevent injury to the persons or property of petitioners.

Taking a more peaceful tack, respondents might conceivably have applied to the state legislature to exercise its authority to oust petitioners from the premises in question by enacting statutes which would have compelled all persons to respect "racial characteristics" of established neighborhoods. This Court long ago decided that any such legislative action would violate the Fourteenth Amendment.<sup>51</sup>

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<sup>51</sup> *Buchanan v. Warley* and others. Even such an ingenious device as the one reviewed by the Texas Supreme Court in *City of Dallas v. Liberty Annex Corp.*, 295 S. W. 591, failed under this prohibition.



Recourse to the active police authority of the state might have been undertaken to eject petitioners, but there can be no doubt that the executive arm of the state government would have been obliged to conform to the limitations of the Fourteenth Amendment.<sup>52</sup>

This record is barren of any indications that it is anything other than the decree of the state court which operates to deny to petitioners the right to occupy as their home the premises to which they hold title. The decree of the Circuit Court affirmed by the Supreme Court of Michigan ordered petitioners to move from their property within ninety days and declared that they "are hereby restrained and enjoined from using or occupying said premises". (R. 53). The covenant did not prevent petitioners from purchasing, using and occupying their property.

It is not the private respondents, but the State of Michigan, acting through its courts, that prevents petitioners from using and occupying their property. Failure of the petitioners to comply with the order of the Court would set in motion governmental machinery leading to contempt citations and imprisonment in the jails maintained by the State of Michigan.

***C. Neither the Existence of the Restrictive Agreement Nor the Fact That the State's Action Was Taken in Reference Thereto Alters in Any Way the State's Responsibility Under the Fourteenth Amendment for Infringing a Civil Right.***

The existence of a legal right to acquire a home from any willing seller and to own and occupy that home has already been demonstrated under Point II of this brief.

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<sup>52</sup> *Home Telegraph v. Los Angeles*, 227 U. S. 278; *Yick Wo v. Hopkins*, 118 U. S. 356.

That right is recognized by the Constitution and laws of the United States and the decisions of this Court. Its exercise is protected by the Fourteenth Amendment against any racial impediment imposed by any form of state action.

In this case, it appears to be the position of respondents that only the private covenantors do the discriminating while the state, as an impartial, if essential, third party merely enforces the private agreement without concern for its content, as it allegedly would do in any other business agreement. However, the role and responsibility of the state in sanctioning or refusing to sanction such an agreement or any agreement cannot be divorced from the subject matter of the agreement. Under our system of law, judicial action in such a case, as this can only be the result of the judge's conclusion that he is vindicating some interest or interests of public concern and worthy of the state's protection.

The history of restrictive covenants as outlined in Point I of this brief clearly shows the judicial balancing of interests as new doctrine emerged. In the present case, the action of the courts below must have been predicated upon a conclusion that it was a matter of serious public concern to compel the carrying out of bargains in general and to protect the private interest of the respondents in getting the benefit of their bargain in this case. The state courts failed, however, to recognize their duty to weigh these claims tending to induce state action against essential interests adversely affected by enforcement of the agreement as well as against the obligation of the state to protect the civil right involved in this case.

The predominance of social interests adverse to enforcement has given rise to the entire body of the illegal and unenforceable contracts. The recognition of such interests here, as they are developed in Point V of this brief, would

have resulted in a conclusion that the agreement was against public policy. But more significant, at the present stage of the litigation, is the fact that this Court, in a group of recent cases, has held that the desire of the state to promote well-recognized and accepted private and public interests must be subordinated to the obligation of the state to respect fundamental constitutionally protected civil rights.

In *Cantwell v. Connecticut*,<sup>53</sup> the desire to protect what the state understandably considered important public and private interests led the state court to invoke common law doctrine definitive of breach of the peace and to impose criminal sanctions against the defendant. However, in so doing, the state court caused the interests which appealed to its judgment to prevail over a fundamental civil right. This Court concluded that the abridgement of that civil right though made in favor of substantial competing interests could not stand—the constitutionally protected civil right had to be respected even if some sacrifice of other interests of legitimate concern was a necessary result.

The means employed by the court can be reasonably considered as being adapted to the accomplishment of this legitimate end. Similar basic considerations underlay the injunction in *American Federation of Labor v. Swing*.<sup>54</sup> In addition, there was legitimate public concern with protecting the interests of the employer in maintaining and operating his business. But in this case again, as in the *Cantwell* case, the state's concern to protect property and to preserve peace and good order when translated into judicial action came "into fatal collision with the overriding interests protected by the federal compact".<sup>55</sup>

<sup>53</sup> 310 U. S. 296.

<sup>54</sup> 312 U. S. 321.

<sup>55</sup> 310 U. S. 296, 308.

In *Marsh v. Alabama*,<sup>56</sup> the concern of the state in assisting the owner of land to exclude others from his property and the general interests of the state in peace and good order could not override the right of the individual to exercise his fundamental and constitutionally protected liberty of speech and worship. A significant analogy under the National Labor Relations Act is presented by *Republic Aviation Corp. v. National Labor Relations Board*.<sup>57</sup> There this Court struck down the application of a general rule of the employer against solicitation on his property, apparently imposed in good faith and for reasonable purposes, to a situation where solicitation of union membership had occurred on the employer's parking lot at lunch time. The employer was not permitted to exercise normal and reasonable control over the use of his property when the consequence was the abridgement of a federally protected right.

In each of these cases, the state court concluded that public interests of substance were being prejudiced and injury was being suffered by private persons. With an eye solely to such considerations it regarded any effect which its judgment might have upon a civil right as an unavoidable and unintended incident of action which had ample justification. Yet, in none of these cases could the state escape the obligation of squaring its action with the overriding mandate of the Fourteenth Amendment or other source of fundamental rights regardless of the consequence of such squaring to other interests. No more can the protection of the plaintiffs here from the loss of the value of their bargain, or the vindication of any other public interest which the state court may deem important, justify the state's interference with the petitioners' right of access to a home free from all impediment based on race.

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<sup>56</sup> 326 U. S. 501.

<sup>57</sup> 324 U. S. 793.



***The Fact That Neither Petitioners Nor Their Grantors Were Parties to the Covenant Further Emphasizes the State's Responsible and Predominant Role in the Action Taken Against Them.***

Petitioners' grantors have not at any time agreed to refrain from selling their property to Negroes. The restrictive agreement upon which the court predicated its order directing petitioners to move from their home was signed in 1934 by predecessors in title of petitioners' grantors. Neither petitioners nor their grantors are parties to the agreement.

If any doubt exists as to the extent or significance of state action involved in court enforcement of a racial restrictive agreement as to occupancy of land between original parties to the agreement, an examination of the history of "covenants running with the land" reveals that insofar as they impose obligations on third persons, such covenants are wholly the creature of equity.

The development of the various devices to give substance to restrictions on use of land has been fully discussed in Point I of this brief. Here it is important to note that, in the words of Dean (later Chief Justice) Stone, they have their origin in contract "and their nature and extent depend upon the extent to which equity will compel compliance with the covenant, not only by and for parties to it, but by and for third persons. . . ."<sup>58</sup>

Further, it is asserted that in creating the doctrine of equitable servitudes as transferable choses in action, equity.

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<sup>58</sup> Stone, "Equitable Rights and Liabilities of Strangers to a Contract," 18 COL. L. REV. 295.

exercised broader power than the common law had contemplated, for:

"It is obvious that equity in enforcing the burden of the contracts on third persons had departed from the rules of property, because of their inadequacy and inapplicability to certain situations."<sup>59</sup>

Since the rights thus enforced against third persons find their basis in the powers of courts of equity alone,

"A legitimate limitation on the doctrine of the equitable burden is the rule that such contracts will be strictly interpreted and the rule that equity may, in its discretion, refuse relief where owing to the change of conditions, enforcement of the restrictive covenant would be very burdensome to the defendant and of little benefit to the plaintiff."<sup>60</sup>

The chose in action created by the contract was not at common law freely transferable, but equity overcame this obstacle by holding that, "the transferee of the covenantee's land is *by operation of law* vested with the right to enforce the covenant."<sup>61</sup>

Dean (later Chief Justice) Stone, concluding his survey, finds proof in this doctrine that equity is still a live and forceful field of jurisprudence:

"Consideration of the ways in which equity has extended the rights and liabilities of third persons will lead to the conclusion that, as an effective instrumentality for expanding and developing our law, equity is in no proper sense decadent, but is rather a vital force."<sup>62</sup>

<sup>59</sup> Ibid., p. 322.

<sup>60</sup> Ibid., p. 323.

<sup>61</sup> Stone, "Equitable Rights and Liabilities of Strangers to a Contract," 19 COL. L. REV. 177, 182.

<sup>62</sup> Ibid., p. 191.

Should it be argued that between parties to such a restrictive agreement, as presented here, the courts have some extraordinary power to make a party keep his promise without regard to the Fourteenth Amendment, there is not even colorable basis for such an evasion of constitutional obligation where the enforcement runs against persons not party to the agreement. If, as between the original parties, any significance can be attached to the fact that the Court is giving effect to the will of the parties, in the case of a third person not a party to the contract the court is imposing upon those who never have assented an extraordinary obligation of its own devising. In the latter case—the instant case—the state, through its court of equity, becomes in a very special sense the creative and moving force, solely responsible for the abridgement of the grantor's power of disposition and the grantee's power of acquisition.

***D. Petitioners' Right to Relief in This Case Is Not Affected by the Decision in Corrigan v. Buckley.***

In both the trial court and in the Supreme Court of Michigan, petitioners pressed the contention that judicial enforcement of the covenant would violate the Fourteenth Amendment (R. 6, 17). The latter court disposed of this contention in the following manner:

“It is argued that the restriction in question violates the 14th Amendment to the Constitution of the United States. Appellees say that this argument was answered in *Corrigan v. Buckley*, 271 U. S. 323 (70 L. ed. 969). We so read the *Corrigan* case, although that decision partly turned on the inapplicability of the equal protection clause of the 14th Amendment to the District of Columbia, and the appeal was dismissed for want of jurisdiction” (R. 66).

In like manner, judicial enforceability of racial restrictive covenants has generally been assumed to follow from

*Corrigan v. Buckley*.<sup>63</sup> A reexamination of that case will reveal that there has been widespread misconception of its holding, and will demonstrate that the issue here presented was neither presented nor decided there.

In 1921, 30 white persons, including the plaintiff and the defendant Corrigan, who owned 25 parcels of land situated in the City of Washington, executed and recorded an indenture in which they mutually covenanted that no part of these properties should be used or occupied by, or sold, leased or given to, any person of the Negro race or blood, for a period of 21 years. During the ensuing year, defendant Corrigan entered into a contract to sell to defendant Curtis, a Negro, a parcel included within the terms of the indenture. Plaintiff thereupon brought suit praying that defendant Corrigan be enjoined during the term of the indenture from conveying to defendant Curtis, and that defendant Curtis be enjoined from taking title to the lot during such period, and from using or occupying it. Defendant Corrigan moved to dismiss the bill on the grounds that the "*indenture or covenant* made the basis of said bill" is (1) "void in that the same is contrary to and in violation of the Constitution of the United States," and (2) "is void in that the same is contrary to public policy." Defendant Curtis moved to dismiss the bill on the ground that it appeared therein that the *indenture or covenant* "is void, in that it attempts to deprive the defendant, the said Helen Curtis, and others of property, without due process of law; abridges the privilege and immunities of citizens of the United States, including the defendant Helen Curtis, and other persons within this jurisdiction (and denies them) the equal protection of the law, and therefore, is forbidden by the Constitution of the United States, and especially by the Fifth, Thirteenth, and Fourteenth Amendments thereof,

<sup>63</sup> 271 U. S. 323.



and the Laws enacted in aid and under the sanction of the said Thirteenth and Fourteenth Amendments. This motion was overruled. Defendants elected to stand on their motions, and a final decree was entered enjoining them as prayed in the bill. An appeal was taken to the Court of Appeals for the District of Columbia<sup>64</sup> where the issue was stated as follows:

" \* \* \* The sole issue is the power of a number of landowners to *execute* and record a covenant running with the land, by which they bind themselves, their heirs and assigns, during a period of 21 years, to prevent any of the land described in the covenant from being sold, leased to, or occupied by Negroes" (299 F. 899, 901). (Italics ours.)

After affirmance by the Court of Appeals, an *appeal* was taken to this Court; <sup>65</sup> based entirely upon defendants' contention that the *covenant* was *void* because it violated the Fifth, Thirteenth and Fourteenth Amendments of the Constitution and Section 1977, 1978, and 1979 of the Revised Statutes (U. S. Code, Title 8, Sections 41, 42 and 43). This Court affirmed and in so doing established the following propositions (numbers ours):

- (1) "Under the pleadings in the present case the only constitutional question involved was that arising under the assertions in the motions to dismiss that the *indenture* or *covenant* which is the basis of the bill, is '*void*' in that it is contrary to and forbidden by the Fifth, Thirteenth and Fourteenth Amendments. This contention is entirely lacking

<sup>64</sup> 55 App. D. C. 30, 299 F. 899 (1924).

<sup>65</sup> Section 250 of the Judicial Code (36 Stat. 1159), as it read on the critical date, authorized appeals in six sorts of cases, including (Third) "cases involving the construction or application of the Constitution of the United States \* \* \*" and (Sixth) "cases in which the construction of any law of the United States is drawn in question by the defendant."

in substance or color of merit. . . . (The Court pointed out that the Fifth and Fourteenth Amendments dealt only with governmental action and not with the action of private persons, and that the Thirteenth Amendment dealt only with involuntary servitude) . . . It is obvious that none of these amendments prohibited private individuals from *entering into* contracts respecting the control and disposition of their own property; and there is no color whatever for the contention that they rendered the *indenture void* . . . (271 U. S. 323, 330).

- (2) "And, plainly, the claim urged in this Court that they were to be looked to, in connection with the provisions of the Revised Statutes and the decisions of the courts, in determining the contention, earnestly pressed, that the *indenture* is *void* as being 'against public policy', does not involve a constitutional question within the meaning of the Code provision . . . (271 U. S. 323, 330).
- (3) "The claim that the defendants drew in question the 'construction' of sections 1977, 1978 and 1979 of the Revised Statutes, is equally unsubstantial. The only question raised as to these statutes under the pleadings was the assertion in the motion interposed by the defendant Curtis, that the *indenture* is *void* in that it is forbidden by the laws enacted in aid and under the sanction of the Thirteenth and Fourteenth Amendments. . . . they, like the Constitutional Amendment under whose sanction they were enacted, do not in any manner prohibit or invalidate *contracts entered into* by private individuals in respect to the control and disposition of their own property. There is no color for the contention that they rendered the *indenture void*; nor was it claimed in this Court that they had, in and of themselves, any such effect . . . (271 U. S. 323, 330-331).
- (4) "And while it was further urged in this Court that the decrees of the courts below in themselves deprived the defendants of their liberty and prop-

erty without due process of law, in violation of the Fifth and Fourteenth Amendments, this contention likewise cannot serve as a jurisdictional basis for the appeal. Assuming that such a contention, if of a substantial character, might have constituted ground for an appeal under paragraph 3 of the Code provision, *it was not raised by the petition for the appeal, or by any assignment of error, either in the Court of Appeals or in this Court; \* \* \** (271 U. S. 323, 331).

- (5) “ \* \* \* we cannot determine upon the merits the contentions earnestly pressed by the defendants in this court that the *indenture* is not only *void* because contrary to public policy, but *is also of such a discriminatory character* that a court of equity will not lend its aid by enforcing the specific enforcement of the covenant. These are questions involving a consideration of rules not expressed in any constitutional or statutory provision, but claimed to be a part of the common or general law in force in the District of Columbia; and, plainly, they may not be reviewed under this appeal unless jurisdiction of the case is otherwise acquired.

*“Hence, without a consideration of these questions, the appeal must be, and is dismissed for want of jurisdiction”* (271 U. S. 323, 332). (Italics ours.)

So it is crystal clear that this Court did not and could not pass upon the constitutional propriety of judicial enforcement of a racial restrictive covenant. Such question could only be considered if the Court had acquired jurisdiction and had examined the case on its merits. While the *Corrigan v. Buckley* decision contains an intimation by way of dictum that no substantial constitutional question was presented by the facts of that case, it is to be remembered that this Court was not then committed to the doctrine that common law determinations of courts could constitute reviewable violations of the Federal Constitution.

## V

**While No State-Sanctioned Discrimination Can Be Consistent With the Fourteenth Amendment, the Nation-Wide Destruction of Human and Economic Values Which Results From Racial Residential Segregation Makes This Form of Discrimination Peculiarly Repugnant.**

**A. Judicial Enforcement of Restrictive Covenants Has Created a Uniform Pattern of Unprecedented Overcrowding and Congestion in the Housing of Negroes and an Appalling Deterioration of Their Dwelling Conditions. The Extension and Aggravation of Slum Conditions Have in Turn Resulted in a Serious Rise in Disease, Crime, Vice, Racial Tension and Mob Violence.**

**1. The Immediate Effects of the Enforcement of Covenants Against Negroes.**

The race restrictive covenant is a relatively new device which has become the vogue in conveyancing in many urban centers of the North. Its use is increasing in epidemic proportions.<sup>1</sup> Primarily it is employed to bar the Negro and certain other minority groups from most residential areas, and thus effectively limits the space and housing facilities in which these Americans may live.

Ironically, the restrictive covenants thrive—indeed they become possible—only where they do the most harm and work the greatest injustice. The effects of these covenants can be properly evaluated only if they are viewed against

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<sup>1</sup> Abrams, *Discriminatory Restrictive Covenants—A Challenge to the American Bar*, address before Bar Association of the City of New York, February 19, 1947, pp. 1-2.



the background of rapid urbanization of the Negro population—a process which began to gather momentum with the “Great Migration” of World War I. In Detroit, for example, the decade between 1910 and 1920 saw 35,000 Negroes pour into a city which previously had less than 6,000—an increase of 600 per cent. in ten years. This accelerated trend has continued ever since as the following table indicates:

*Number and Per Cent of Negroes in the Total Population of Detroit, 1910-40.*

	1910	1920	1930 (a)	1940 (b)
No. of Negroes	5,741	40,838	120,066	149,119
Per Cent of Total Population	1.2%	4.1%	7.7%	9.2%

<sup>a</sup> Source: Bureau of Census, Negroes in the United States, 1920-32, 1935, table 10, p. 55.

<sup>b</sup> Source: Bureau of the Census, 16th Census, 1940.

This pattern is by no means peculiar to Detroit but is typical of all of the large urban areas in the North.<sup>2</sup>

World War II occasioned another major movement of Negroes to Detroit, the volume of which can best be comprehended by considering the whole Detroit metropolitan area rather than the city proper. This development, as reflected by the data for non-whites (of whom over 95 per cent were Negroes), is shown in the following table:

*Number and Per Cent of Non-white Resident in Detroit Metropolitan Area, 1940 and 1947.<sup>a</sup>*

	1940	1947
No. of non-whites	171,877	348,245
Per Cent of non-whites	7%	13%

<sup>a</sup> Source: Bureau of the Census, Current Population Reports, Population Characteristics, Series P, 21, 1947.

<sup>2</sup> Bureau of Census—Negroes in the United States, 1920-32, 1935, table 10, page 55.

The recent war also occasioned the movement of an unprecedented number of Negroes to the West Coast. In Los Angeles, the Negro population increased 108.7 per cent from 1940 to 1946<sup>3</sup> and in San Francisco, 560.4 per cent from 1940 to 1945.<sup>4</sup>

With each new wave of Negro migration into the cities of the North, restrictive covenants hemming them into limited areas of living, became more and more extensive.<sup>5</sup> As the colored population grew, the supply of shelter diminished. In the metropolitan district of Detroit, for example, the non-white population, which constituted seven per cent of the total in 1940, occupied seven per cent of the dwelling units in the area.<sup>6</sup> By 1947, non-whites were 13 per cent of the residents in the metropolitan district but they occupied only 11 per cent of the dwelling units. In other cities, including Chicago, Los Angeles, Washington, Baltimore, Toledo and Columbus, where racial covenants are prevalent, non-whites similarly failed to get a numerical share of existing housing proportionate to their percentage in the total population.<sup>7</sup>

While some individuals in most migrant groups found escape from the slum and blighted areas as they improved

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<sup>3</sup> Special Census, Race, Sex by Census Tract, U. S. Census as of Jan. 28, 1946.

<sup>4</sup> Special Census, Race, Sex by Census Tract, U. S. Census as of Aug. 1, 1945.

<sup>5</sup> Weaver, *Race Restrictive Housing Covenants*, Journal of Land and Public Utility Economics, Aug., 1944, p. 185.

<sup>6</sup> It should be noted that the term "dwelling unit" has a different meaning when applied to housing occupied by white and by colored people. Because of the high incidence of improvised conversions, and great overcrowding in the Black Belt a dwelling unit there is often no more than a single room.

<sup>7</sup> See chart entitled "Total Population, Non-White Population, Percentage of Non-White \* \* \* in Selected Northern and Border Metropolitan Districts, 1940 and 1947" in Appendix A, p. 92.

their economic and cultural status,<sup>8</sup> the degree of concentration of Negroes has increased with the passing of time.<sup>9</sup> Spatial separation of ethnic groups, which was temporary for European immigrants and native white migrants, became permanent for colored Americans. For the latter group this separation was no longer occasioned by economic forces alone. Residential segregation was not a voluntary matter for Negroes; it was enforced. A new and distinctly American ghetto was developing, and race restrictive covenants, enforced by the courts, were the principal instrument in institutionalizing this pattern in American cities:

In this situation, only two things could possibly happen. Either the Black Belt could attempt to absorb more inhabitants or the areas available to Negroes could expand. The prevalence and enforcement of restrictive covenants sharply reduced the possibilities of expansion and free movement of Negro families regardless of their income or cultural level, thereby intensifying the overcrowding of already densely populated Negro ghettos. This resulted in an alarming decline in the living standards of a large segment of our population.

#### (a) *Overcrowding*

The accepted standard by which the housing experts measure overcrowding in dwellings is the relationship between the number of persons and the number of rooms. A

<sup>8</sup> The President's Conference on Home Building and House Ownership, *Report of Committee on Negro Housing*, Negro Housing, 1932, p. 5; Park, Burgess and McKenzie, *The City*, University of Chicago Press, 1925, pp. 47-79; Burgess, *Residential Segregation in American Cities*, *Annals of the American Academy of Social and Political Science*, November, 1928, pp. 108-12; Cressey, *The Succession of Cultural Groups in the City of Chicago*, University of Chicago, 1930 (A Ph.D. thesis in the Development of Sociology, pp. 58-9; 84-94, tables VI, VIII and X).

<sup>9</sup> Cressey, *op. cit.*, p. 94, table XI.

dwelling is regarded as overcrowded when there are fewer rooms than there are persons to live in them.<sup>10</sup> Measured by this definition, 27 per cent of all housing occupied by Negroes in the City of Detroit was overcrowded in 1944.<sup>11</sup> Similarly, it is reported that in 1940, 24.8 per cent of all dwelling units occupied by non-whites contained six or more persons.<sup>12</sup> It has been reliably estimated that if all Negro families in Detroit in 1946 had been safely housed (and here the very conservative average of four persons per occupied dwelling unit was used as a standard), an additional 19,000 dwellings for Negro occupancy would have been required over and above the 35,000 in existence in 1940.<sup>13</sup>

The same situation of extreme density of population is found in most of the other Northern urban centers.<sup>14</sup> In 1943 density in the heart of the Chicago Black Belt had reached 80,000 persons per square mile, so that into an area

<sup>10</sup> Edith Elmer Wood, *INTRODUCTION TO HOUSING*, U. S. H. A. Washington, 1939, p. 36.

<sup>11</sup> *THE PEOPLE OF DETROIT*, Master Plan Reports, Detroit City Planning Commission 1946, p. 19. Of the overcrowded dwelling units occupied by Negroes in Detroit, 9.2 per cent (as compared to 3.4 per cent of the total number of dwelling units) showed a ratio of more than 1.5 persons per room.

<sup>12</sup> Table 9, *HOUSING—GENERAL CHARACTERISTICS*, Michigan, 16th Census of the United States, 1940.

<sup>13</sup> *People of Detroit*, *ibid*, footnote 11.

<sup>14</sup> Per Cent of Total Dwelling Units With From 0.5 to 2 or More Persons Per Room, in the North and West, 1940<sup>a</sup>:

No. of persons per room	Urban North		Urban West	
	White	Non-White	White	Non-White
0.5 or less	32.8	25.4	35.3	27.7
0.51 to 1.00	53.7	49.3	53.0	49.7
1.01 to 1.50	9.7	14.4	7.2	11.9
1.51 to 2.00	3.1	8.0	3.2	7.3
2.01 or more	0.7	2.9	1.4	3.3

<sup>a</sup> Source: *Housing, Vol. II, Part I*, table 4, 16th Census of the United States.



of only 7½ square miles there were compressed 300,000 colored Americans.<sup>15</sup> In a sample study conducted in Chicago in 1944, it was found that 4.4% of the city's dwelling units were occupied by more than 1.5 persons per room, whereas in an area (exclusively inhabited by Negroes) more than one-third of the dwelling units were so occupied. The 75 structures in this sample area were designed—or ~~more accurately, converted—to house~~ 135 families, but at the date of inspection were occupied by more than two and one-half times that number.<sup>16</sup>

The following chart showing the relative incidence of overcrowding in white and Negro neighborhoods in a few other cities in 1945 follows the same pattern:

*Per Cent of Tenant Occupied Dwelling Units With More Than 1.5 Persons Per Room, by Race, 1945<sup>a</sup>*

	White	Negro
Cincinnati	6.9	15.3
Cleveland	1.9	8.7
St. Louis	5.1	20.2
Indianapolis	3.0	7.0

<sup>a</sup> Source: Special surveys of Census Bureau and Bureau of Labor Statistics.

With respect to our Nation's Capital, the information contained in the brief submitted to this Court by the Petitioners in the cases of *Urciola v. Hodge* and *Hurd v. Hodge*, shows most graphically the same appalling condition of overcrowding in the Negro areas of Washington.<sup>17</sup>

<sup>15</sup> Cayton, HOUSING FOR NEGROES, *Chicago Sun*, Dec. 13, 1943.

<sup>16</sup> THE SLUM . . . IS REHABILITATION POSSIBLE? The Chicago Housing Authority, 1946, p. 15. (The area chosen was picked as representative of Negro slum conditions, neither the best nor the worst block in the Black Belt.)

<sup>17</sup> *Hurd v. Hodge et al.*, No. 290, October Term, 1947; *Urciola et al. v. Hodge et al.*, No. 291, October Term, 1947.

The immediate effect of the enforcement of restrictive covenants is abundantly clear from the statistical evidence. Because Negroes have been unable to exercise their civil right to move freely to new living quarters, the Black Ghettos have become increasingly and dangerously overcrowded.

(b) *Conditions of Dwellings*

It is a corollary of overcrowded housing that the conditions of living inevitably fall far below the standards of safety and health which every citizen has reason to expect. The continuous process by which thousands<sup>15</sup> of new Negro migrants arrive annually in the Black Belts of our Northern cities results in a perpetual deterioration in the living conditions of these people. The impact upon the Negro has been disproportionately severe. He pays higher rentals for inferior dwellings<sup>16</sup>—inferior to the point of endangering the lives and well-being of himself and his children. Because of the discrimination practiced through restrictive covenants, only a small portion of the total housing supply is opened to the Negro and the opportunity of improving his status, with respect to the barest necessities of living, is cut off in deference to the "private agreement" of his white neighbors.

Viewing the condition of dwellings upon a nation-wide basis, it will be seen from the 1940 Census that 83 per cent of the dwellings occupied by Negroes were in need of major repairs or contained plumbing deficiencies. The comparable figure for white dwellings was 45 per cent. Twenty-six per cent of the dwellings occupied by non-whites which needed major repairs were without running water (9.2 was

<sup>15</sup> Robinson, RELATION BETWEEN CONDITION OF DWELLINGS AND RENTALS, BY RACE, *Journal of Land and Public Utility Economics*, August, 1946, pp. 299-302.

the ratio in white dwellings). In those non-white dwellings which did not require major repairs, 35.5 per cent were without running water as compared to 17.4 per cent of the white dwellings. While 59 per cent of all dwelling units occupied by whites had private baths and toilets, these necessities were found in only 20.5 per cent of non-white dwellings.<sup>19</sup>

In the North and West, where there was less differential in Negro and white incomes than in the South, the racial differential in the quality of housing was outstanding, as is shown in the following table.

State of Repair and Plumbing Equipment for Occupied Dwelling Units in the North and West, by Race, 1940<sup>a</sup>

*Per Cent of Total Units for Each Group*

The North	Total	Whites	Non-Whites
Needing major repairs or with plumbing deficiencies	24.9	23.5	52.1
With plumbing deficiencies but not needing major repairs	14.8	14.2	25.8
Needing major repairs	10.1	9.3	26.3
The West			
Needing major repairs or with plumbing deficiencies	20.1	19.6	36.9
With plumbing deficiencies, but not needing major repairs	11.2	11.0	18.6
Needing major repairs	8.9	8.6	18.3

<sup>a</sup> Source: *Housing, Volume II, General Characteristics, Part I, United States Summary*, 16th Census of the United States, tables 6b and 6c.

The condition of dwelling units among whites and non-whites in the City of Detroit is graphically portrayed in a

<sup>19</sup> *Housing, Volume II, General Characteristics, Part I, United States Summary*, 16th Census of the United States, 1940.

recent report of the Bureau of The Census of the United States Department of Commerce. The higher incidence of substandard<sup>20</sup> dwellings among non-whites is apparent from the following chart drawn from this Census report:

A Comparison of the Condition of Dwelling Units in  
The City of Detroit, 1947 \*

	White Per cent	Non-White Number	Per cent
Substandard	9%	26,269	31%
Needing major repairs	3%	21,208	25%
Lacking private bath	1%	6,266	8%
Lacking private toilet	5%	5,784	7%
No running water in unit	1%	1,687	2%

\* Source: Current Population Reports, Housing, Characteristics of Detroit, Michigan, April, 1947, Bureau of the Census, Series P/71, No. 19.

Of all of the substandard units in Detroit, those occupied by non-whites accounted for 33 per cent. This is to be contrasted with the fact that the non-whites occupy only 11 per cent of all currently occupied units in the city.

In the heart of the Negro areas of Detroit, the conditions are even more deplorable. In census Area K, which includes the so-called "Black Bottom" and "Paradise Valley" slums in which it is estimated 203,000 Negroes are forced to live, sanitary engineers who recently checked the area found that between 90 and 95 per cent of all houses were substandard.<sup>21</sup>

<sup>20</sup> Substandard is used herein to designate a dwelling needing major repairs or lacking private bath, toilet or running water.

<sup>21</sup> Velie, *Housing: Detroit's Time Bomb*, COLLIER'S, November 23, 1946, p. 77.



A recent study of sixteen Northern and Western cities, including Detroit, revealed that while only 16.5 per cent of the white units were substandard (*i. e.* needing major repairs or with plumbing deficiencies), 44.9 per cent of the non-white units were deemed to be substandard.<sup>22</sup>

This analyst finds: "analysis of the relationship between the condition of dwellings and rental value for units occupied by white families and those occupied by non-white families reveals that the non-white group receives proportionately more substandard housing than does the white group for the same rent or rental value."<sup>23</sup>

"The differentials revealed in this analysis may be imputed to the effect of residential racial restrictions. This is supported by the fact that the proportionate differentials between the two racial groups are greatest in the higher rental value brackets where racial restrictive practices operate to maintain a highly discriminatory market, and in the Northern and Western cities where the in migration of non-whites from the South has accentuated racial restrictive practices and greatly accelerated the market in the constricted areas to which the non white group is arbitrarily confined."<sup>24</sup>

The following comparison between two sample blocks in the City of Detroit is also revealing. The first block is occupied exclusively by Negroes; the second exclusively by whites. Although the rent of both of these blocks was almost identical, the disparity of condition, density of population, and age of dwellings is great.

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<sup>22</sup> Robinson, *Relation Between Condition of Dwelling and Rentals by Race*, The Journal of Land and Public Utility Economics, Volume XXII, No. 3, October, 1946, p. 297.

<sup>23</sup> Ibid., p. 298.

<sup>24</sup> Ibid., p. 302.

**Characteristics of a Sample Negro-Occupied and a Sample  
White-Occupied Block in Detroit, 1940<sup>a</sup>**

	Block No. 14, Census Tract 537 (Negro occupied)	Block No. 15, Census Tract 566 (White occupied)
Average Monthly Rental	\$23.41	\$23.61
No. Dwelling units per structure (approximate)	3	1
Per cent Dwelling units built before 1900	2.3	0
Per cent Dwelling units built before 1900 and 1919	86.3	23.8
Per cent Dwelling units built be- tween 1920 and 1929	11.4	76.2
Per cent Dwelling units needing major repairs or lacking private bath facilities	97.0	10.7
Per cent Dwelling units with more than 1.5 persons per room	8.9	5.4

<sup>a</sup> Source: United States Census, Housing Supplement, Block Statistics, Detroit, March, 1940.

It is apparent from these official statistics that the compression of one racial group within strict geographical boundaries has overcrowded the inhabitants beyond endurance. It is equally clear that in those cities which represent the highest technological development of our civilization, a large and important segment of our population lives in unparalleled squalor. These are the immediate effects of restrictive covenants and the sanction given to them.

## **2. The Results of Slum Conditions in Negro Housing.**

The restrictive covenant is the instrument by which the normal expansion of living facilities available to Negroes has been made impossible. The needs of Negroes have not

been met by new housing since a large proportion of this housing is covered by racial covenants,<sup>25</sup> and the areas occupied by colored Americans have been surrounded by racial covenants, public facilities, or economic and industrial property. Thus, the supply of available shelter has never caught up with the demand. The poorly housed have become more poorly housed. The Black Belt in every city has become a slum—the ultimate in the degeneration of the American dwelling place.

The results of these conditions in terms of public welfare and community life are amply documented by public record. This Court may take notice of the higher incidence of disease, crime, vice, and violence in unhealthy and deplorable living areas. It is here proposed to set out in summary form some of the observations and conclusions of experts in these special social fields with particular reference to the conditions existing in the Negro ghetto.

The chain of causation is apparent; these are the effects, once removed, of the judicial sanction which the courts have given to race restrictive covenants. There are the products of enforced residential segregation.

#### **a. The Effect of Residential Segregation on Health.**

It has been demonstrated above that residential segregation inevitably forces the segregated group into blighted and overcrowded areas. These conditions in themselves create a serious health hazard regardless of the economic status of the segregated group. Authorities in the field of

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<sup>25</sup> A recent summary demonstrated that in 315 subdivisions opened in the last 10 years in Queens, Nassau and Southern Westchester (New York) over half the dwelling units were covered by racial covenants. See Architectural Forum, October, 1947, p. 16.

public health and public housing are agreed that bad housing has a direct and disastrous result upon health.<sup>26</sup>

Frequent contact of large numbers of individuals in a restricted area cause significant increases in respiratory diseases.<sup>27</sup> This is demonstrated by the high mortality rates resulting from tuberculosis, pneumonia, influenza and the common communicable diseases of childhood in overcrowded areas.<sup>28</sup>

The unsanitary condition and general dilapidation of houses in blighted areas present another serious health hazard. More graphically these hazards consist of inadequate and filthy toilet facilities, rat and vermin infestation, dampness, lack of heat and sunlight. These result in a high incidence of diarrheal and digestive ailments. For example, typhoid fever was 100% more frequent in slums; indigestion

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<sup>26</sup> W. J. Smillie, *Preventive Medicine and Public Health* (The MacMillan Company, New York, 1946); "Basic Principles of Healthful Housing," Committee on Hygiene of Housing of the American Public Health Association; C. E. A. Winslow, *Housing for Health* (The Milbank Foundation, 1941).

<sup>27</sup> Britton, *New Light on the Relation of Housing to Health*, 32 *American Journal of Public Health* 193 (1942).

<sup>28</sup> Thus:

The secondary attack rate for tuberculosis is 200% greater for relief families living in overcrowded housing than for all income groups living with less than one person per room.

• (Britton, *op. cit.*)

The argument that Negroes have a higher susceptibility to tuberculosis is offset by an analysis of the tuberculosis rate in both Negro and white slum areas, showing that both have a highly excessive incidence of the disease.

(*"Report on Housing," Chicago, Cook County Health Survey; "Health Data Book for the City of Chicago"; U. S. Census, 1940*); Britton & Altman, "Illness and Accidents among Persons Living under Different Housing Conditions," 56 *Public Health Reports* 609 (1941).



and stomach ailments 75% more frequent; diarrhea, enteritis and colitis 40% higher. These relationships hold even if the economic factors were taken into account.<sup>29</sup> These conditions also resulted in a high incidence of rheumatic fever, the most common cause of heart disease among individuals under 45.<sup>30</sup>

The infant mortality rate is the most sensitive single index of health and progress. If such an index of social conscience and progress is applied to the Negro people, it is seen that they are excluded from the benefits of the American way of life.

"City-born babies, and those born in the towns, have a slight edge on babies born in the country, in their chance for survival. That comparison holds true *only for white children* however; in the non-white group, which is mostly Negro, those born in the rural areas have a better chance than those in the urban areas, though still not anywhere near as good a chance as the white child in either city or country. The reason may be that the conditions under which Negroes must live in the cities and towns represent a hazard for babies that outweigh other factors, such as more and better medical care and access to hospitals, that tend to give the city-born child the advantage."<sup>32</sup>

<sup>29</sup> Britton and Altman, *Illness and Accidents Among Persons Living Under Different Housing Conditions*, 56 Public Health Reports 609 (1941).

<sup>30</sup> Paul, *The Epidemiology of Rheumatic Fever and Some of Its Public Health Aspects*, Metropolitan Life Insurance Co., 1943; Wedum and Wedum, *Rheumatic Fever in Cincinnati in Relation to Rentals, Crowding, Density of Population and Negroes*, 34 American Journal of Public Health 1065 (1945).

<sup>32</sup> "Our Nation's Children," No. 8, August, 1947, Federal Security Agency, U. S. Children's Bureau.

This statement is given grim reality by the tragic pattern of Negro infant mortality rates which are 65% higher than for white babies in all areas of the United States.<sup>33</sup>

Despite the increased use of hospitals for child birth throughout the cities of the United States, two or three times as many Negro mothers die in child birth as white mothers.<sup>34</sup>

The City of Detroit presents no variation in the nationwide picture of the relation between residential segregation and the high incidence of disease. Thus, the mortality rate per 100,000 from tuberculosis in that city was 36.5 for whites and 189.0 for Negroes during the period from 1939-1941.<sup>35</sup> For pneumonia, the death rate for Negroes is 71.5 per 100,000, for whites 23.3 per 100,000. The infant mortality rate for Negroes is 49.8 per thousand, compared with 28.0 per thousand for whites.

In terms of citizenship, the psychological evils flowing from segregated housing are equally as important to society as the physical health hazards discussed above. Draft rejection rates in the Second World War for personality disorders increased significantly in slum and overcrowded areas.<sup>36</sup> Furthermore, Negro draftees had the highest rates

<sup>33</sup> Gover, *Negro Mortality; N The Birth Rate and Infant and Maternal Mortalities*, 61 Public Health Reports 43 (1946). In New York City with the most progressive health department in the country, the Negro mortality rate is 50% higher than the white rate. Vital Statistics, New York City Health Department, 1946.

<sup>34</sup> Ibid.

<sup>35</sup> *Mortality from Tuberculosis, White and Non-white for Selected Cities of 100,000 and Over—1939-41*, Tuberculosis in the United States by National Tuberculosis Association and the U. S. Public Health Service, 1945.

<sup>36</sup> A study of Washington, D. C. draft rejection rates is found in Hadley, et al. *Medical Psychiatry; an Ecological Note*, VII Psychiatry 379 (1944), and a study of Boston and surrounding areas is found in Hyde & Kingley, *Studies in Medical Sociology: The Relation of Mental Disorders to Population Density*, 77 N. E. Journal of Medicine 571 (1944).

for both psychoneurosis and psychopathy among national and ethnic groups, a factor explained in the studies as related to "the intensity and severity of stress to which many of the Negroes are subjected."<sup>37</sup>

"The most all-pervading sense of frustration that literally engulfs the Negro people in their caste relationship to the majority group and the mechanisms of segregation and discrimination that are its attendant counterparts. \* \* \* Caste is meant to refer to systems of privilege and the limiting of spontaneous participation in the culture of which the Negro people are a part.

"The typical American town has its black ghetto—almost always situated on the other side of the track. It is difficult to stay there and more difficult to leave. Overcrowding and congestion become commonplace. Individual privacy and respect for it disappears."<sup>38</sup>

In a study of mental disorders in urban areas it was demonstrated that social communication between population groups was essential to healthy mental development, and that social isolation of a given group led to increased mental breakdown among its members.<sup>39</sup>

"Bad housing, with its resultant overcrowding, filth, lack of personal and family privacy, its noises, its odors and its dark and dirty corners, breaks down family morale and has a profound and evil influence upon the happiness, welfare and health of the people."<sup>40</sup>

<sup>37</sup> Hyde & Chisholm, *Relation of Mental Disorders to Race and Nationality*, 77 N. E. Journal of Medicine 612 (1944).

<sup>38</sup> Cooper, *The Frustration of Being a Member of a Minority Group*, 29 Mental Hygiene 189 (1945).

<sup>39</sup> Farris & Dunham, *Mental Disorders in Urban Areas: An Ecological Study of Schizophrenia and Other Psychoses*, U. of Chicago Press, 1939.

<sup>40</sup> Smillie, *op cit*.

In human terms, substandard housing means serious interference with the emotional, mental and family life of the individual:

"The Committee on the Hygiene of Housing has correctly pointed out that more damage is done to the health of the children of the United States by a sense of chronic inferiority due to the consciousness of living in substandard dwellings than by all the defective plumbing which those dwellings may contain."<sup>41</sup>

**b. Cost of Residential Segregation to the Community as a Whole.**

Municipal services rendered in slum areas cost far more than the revenue collected.<sup>42</sup> The Federal Works Agency has summarized the situation in metropolitan centers. It found that although slums and blighted areas comprised but 20 per cent of the residential area of the larger cities of the nation in 1940, they housed a third of the people in these cities. While these districts provided only six per cent of the municipal revenue from real estate taxes, they absorbed 45 per cent of the service costs which municipalities had to render.<sup>43</sup> Translated into dollars and cents, this means that

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<sup>41</sup> C. E. A. Winslow: *Housing for Health* (The Milbank Foundation, 1941); see also *Basic Principles of Healthful Housing*, supra.

<sup>42</sup> There are many studies that reflect this fact. One of the pioneering surveys is contained in Edith Elmer Wood, *Slums and Blighted Areas in the United States*, U. S. Government Printing Office, 1935. Other more recent summaries are available: See, *Urban Housing*, Federal Emergency Administration of Public Works, 1937, pp. 8-10; Mabel L. Walker, *Urban Blight and Slums*, Harvard University Press, 1938, pp. 36-63, 68-72; and statement of John B. Blandford, Jr., at Hearings before the Subcommittee on Housing and Urban Redevelopment of the Senate, 79th Congress, 1st Session, Part 6, January 9, 1945, pp. 1233-7.

<sup>43</sup> *Postwar Urban Development*, Federal Works Agency, 1944.



a medium-sized city, such as Newark, New Jersey, spends fourteen million dollars a year maintaining its slums.<sup>44</sup>

The total real estate taxes collected from a restricted group are less than they would be if the group were free to acquire and live in properties which carry higher assessments and yield greater tax revenues. These latter situations increase the tax burden of the rest of the community.

As long as there was only a small proportion and number of colored people with medium and high incomes, the loss in city revenue was small.<sup>45</sup> Changes in the occupational color system occasioned by the war and continuing somewhat in the peace, have altered the picture.<sup>46</sup> Today in the larger industrial centers there is an appreciable number of colored families which can pay their way in housing and taxes. So long as they are relegated to slums or contiguous blighted areas, only a small proportion of them pay as high taxes as they would were they able to secure attractive housing in desirable neighborhoods. The result is a loss in city revenue at the same time that the total population in the subsidized areas of the city is increased.

<sup>44</sup> Rumney and Shuman, *The Cost of Slums In Newark*, Housing Authority of the City of Newark, second printing 1946, p. 15. "We believe that part of this cost would remain even if these areas were rehabilitated, for most residential areas require more in expenditures than they yield in revenues. \* \* \* But certain reductions could be made in the cost of servicing low-income families despite their poverty by eliminating slums" (Ibid., p. 16).

<sup>45</sup> There were, of course, other economic costs most of which penalized the minority groups subjected to ghetto living. "Segregation has little effect on the great bulk of poor Negroes except to overcrowd them and increase housing costs, since their poverty and common needs would separate them voluntarily from whites, just as any European immigrant group is separated. \* \* \* The socially more serious effect of having segregation, however, is not to force this tiny group of middle and upper class Negroes to live among their own group, but to lay the Negro masses open to exploitation and to drive down their housing standard even below what otherwise would be economically possible" (Myrdal, *op. cit.*, p. 625).

<sup>46</sup> Weaver, *Negro Labor: A National Problem*, 1946, Parts 1 and 2.

"Unsolved, the Negro housing dilemma costs Detroit heavily in other ways than jittery nerves. Badly in need of a medical center, express highways, parks and other deferred civic improvements, Detroit must wait indefinitely for them. The land they will occupy now houses hundreds of Negro families who can't be evicted because there's no place for them to go."<sup>47</sup>

Privately financed and publicly financed housing presents problems in every American city. Political pressures and litigation will increasingly challenge federal, state and local aid to housing if it fails to offer equitable participation to minorities. Since private enterprise has repeatedly claimed, in its opposition to public housing, that it can offer decent shelter for all groups as well as public housing in the population, it will have to face the problem of opening more space to colored people.<sup>48</sup>

So pressing is this matter that housing agencies are beginning to study and analyze it, since they recognize that the costs of residential segregation are as great if not greater for city planning and urban redevelopment than for the minorities already restricted to inadequate areas.

"One thing seems clear. In most big cities any housing, city planning or race relations program that does not open up more land on which Negroes may live is ineffectual. Any policy which results in a net reduction either in land or houses available to Negroes is a social menace. Every program to date, low-rent housing, war housing, and now housing for veterans has run up against this problem in one form or another and been partly or wholly stymied by it.

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<sup>47</sup> Velie, *Housing: Detroit's Time Bomb*, Colliers, November 23, 1946, p. 5.

<sup>48</sup> Weaver, *Planning for More Flexible Land Use*, Journal of Land and Public Utility Economics, February, 1947, p. 32.

And there is hardly any current urban redevelopment proposal that should not be carefully scrutinized from this point of view."<sup>49</sup>

**c. Racial Residential Segregation Causes Segregation in All Aspects of Life and Increases Group Tensions and Mob Violence.**

Even a superficial study of crime, juvenile delinquency and health statistics shows that these are indications of social instability greatly aggravated by poor housing and overcrowding. Thus in Detroit, the total slum areas yielded five times as many crimes, and fifteen times as many criminals as a "normal residential area."<sup>50</sup> Since in 1947 Negroes occupied one-third of the total number of substandard units in Detroit, and those units housed a tremendous percentage of the total Negro population, it would be fallacious to conclude that Negroes are undesirable. The Detroit City Planning Commission concludes from these facts that where dependency, crime and juvenile delinquency "are concentrated in special areas, they are evidence that the environment contributes to social pathology."<sup>51</sup>

Faced with the responsibility of raising a family, the Negro like any other human being, seeks to escape the consequence of ghetto life and establish a home away from the environment which results in these personal and social tragedies. "He has no other alternative if he would improve his housing situation, than to seek it in less densely

<sup>49</sup> *Race Relations in Housing Policy*, National Public Housing Conference, 1946, p. 4.

<sup>50</sup> *Housing Facts*, National Housing Agency, Washington, D. C., Jan., 1946, p. 21. The same study showed that slum areas in Cleveland were responsible for 4 per cent of larcenies, 5.7 per cent of robberies, 7.8 per cent of juvenile delinquency, 10.4 per cent of illegitimate births and 21.3 per cent of murders, while housing only 2.47 per cent of the City's population.

<sup>51</sup> *The People of Detroit*, Detroit Planning Commission, 1946, p. 30.

settled areas which are inhabited by whites.”<sup>52</sup> It is at this point that the Negro's normal desire for self improvements meets organized and judicially sanctioned opposition.

Of all the devices to effect residential segregation, restrictive covenants are the most “respectable,” and yet the consequences are the most lasting and harmful. Covenants are promoted by skillful propagandists of race hatred; they reach and involve in anti-Negro activity large groups of citizens who normally opposed violent racism but who participate in this activity because it is something “lawful,” and hence worthy of their support.<sup>53</sup> Since upper-income groups champion and sign race restrictive housing covenants, other groups, less able financially to develop similar instruments, resort to less formal but equally effective means of excluding minorities. As long as the “better people” in a community sign restrictions against certain groups and the courts enforce such agreements, other elements will “protect” their neighborhoods against minorities too.

“Racial segregation in residential areas provides the basic structure for other forms of institutional segregation.”<sup>55</sup>

It is recognized by authorities in city planning that the basis for public services and institutions is the neighbor-

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<sup>52</sup> *The Police and Minority Groups*, Chicago Park District, 1947, p. 67.

<sup>53</sup> For a documentary account of the atrocities of the promoters of racial covenants see President's Annual Report (for 1944); Oakland Kenwood Property Owners Association (Chicago) 1945; *Restrictive Covenants*, The Federation of Neighborhood Associations, Chicago, 1944.

<sup>55</sup> Charles Johnson, *Patterns of Negro Segregation* (1943), p. 8.



hood, rather than the city.<sup>56</sup> From the segregated neighborhood grow segregated schools, health and welfare services and innumerable "Negro" institutions in areas of our country where segregation as a way of life is legally rejected.<sup>57</sup>

In the course of expansion of the ghetto, many second-hand public and semi-private institutions are turned over to Negro use. Thus, regardless of laws banning racial segregation in public facilities, the enforced residential segregation of Negroes makes the large majority of these facilities as completely segregated in Northern cities as in the South, where segregation is fixed by statute.

Consequently, although many states in the North have specific constitutional or statutory prohibitions against segregation in public schools, where there are definable Negro neighborhoods, effective educational segregation is maintained.

<sup>56</sup> The Detroit City Planning Commission has stated:

"The distribution of people within the city and region affects directly the need for public and private facilities. Schools, parks, utilities, shopping facilities, highways and transit must be located where people can use them, whether they happen to be inside or outside a given political boundary.

"The optimum population has been estimated for each neighborhood on an assumption that land will be made available for schools, neighborhood recreation and other community facilities in accordance with accepted standards." Source: *The People of Detroit, Detroit City Planning Commission* (1946), p. 23.

<sup>57</sup> Loren Miller, *Covenants for Exclusion*, Survey Graphic, Oct., 1947, p. 558.

Myrdal observes that in many northern states:

"... there is partial segregation on a voluntary basis, caused by residential segregation aided by the gerrymandering of school districts. ..."<sup>58</sup>

Other public facilities are similarly segregated because of the residential location of the population they serve.<sup>62</sup>

Because of residential segregation, there are created Negro political districts and the political exploitation of racist issues comes easily in such communities. General interest in the over-all problems of democratic government are stilled and divisive racial "blocs" are fostered.

The Detroit City Planning Commission has been seriously concerned with the need for better integration of Negroes into the life of the City. Thus it states:

"The people are barred from full participation in the general life of the community both by restrictions from living in many desirable residential neighborhoods and by exclusion from social, religious and other groups. To the extent that they are compelled to form their own clubs, churches and business associations, they will undoubtedly remain a group with strong feelings of racial identity and minority status."<sup>63</sup>

<sup>58</sup> Myrdal, *An American Dilemma*, 1944, p. 632. A recent study of Negro life in Evanston, Illinois, established that most of the Negro population lived in the Northern section of town, and that a zoning arrangement for school attendance, applicable only to that section, effectively confined Negro children to a segregated school. Economic and Cultural Problems in Evanston, Illinois, as They Relate to the Colored Population, *National Urban League*, Feb., 1945, pp. 56-58. High School students in Los Angeles, Gary and Chicago have staged strikes in the past two years when Negro children were admitted to what the white students had come to regard as "white" schools.

<sup>62</sup> For description of the process of handing down health facilities and the evils attendant upon segregated medical care, see W. Montague Cobb, "Medical Care and the Plight of the Negro," *Crisis*, July, 1947, pp. 201-211.

<sup>63</sup> *The People of Detroit*, Detroit Planning Commission, 1946, p. 34.

Enforced residential separation and resultant patterns of segregation in other phases of American life reflect a staggering human toll:

"The . . . pathological features of the Negro community is of a more general character and grows out of the fact that the Negro is kept behind the walls of segregation and is in an artificial situation in which inferior standards of excellence or efficiency are set up. Since the Negro is not required to compete in the larger world and to assume its responsibilities, he does not have an opportunity to mature."<sup>64</sup>

The inevitable result of housing segregation is to perpetuate prejudice and heighten group tension.

"As long as Negroes are relegated . . . to physically undesirable areas . . . they are associated with blight. The occupants of the black belt are all believed to be undesirable . . . and their perpetual and universal banishment to the ghetto is defended on the basis of imputed racial characteristics."<sup>65</sup>

Racial covenants, once having been imposed upon a neighborhood, give concrete substance and perpetuation to latent opposition to Negroes. The Chicago police say that the restrictive covenant wall binding the ghetto creates areas of tension and conflict requiring special policing.<sup>66</sup> Many analyses of racial conflicts have indicated that the ghetto provides a fertile ground for seeds of racial tension, which erupt into open conflict and riot. "Since the very existence of segregation results in diminished intergroup

<sup>64</sup> E. Franklin Frazier, "Negro Youth at the Crossways," 1940, p. 290.

<sup>65</sup> Weaver, *Chicago, A City of Covenants*, Crisis, March, 1946.

<sup>66</sup> *The Police and Minority Groups*, Chicago Park District, 1947, pp. 64-69—section dealing with residential segregation as a source of group tension.

contact, prejudiced attitudes grow stronger and segregation gains increasing popular acceptance."<sup>67</sup>

Living reality was given to the assertion that inter-group contact diminishes race tension and conflict by the Detroit race riot of 1944. In the areas of mixed racial residence no conflict was reported, and in the factories and shops where Negroes worked side by side, there was reported not a single instance of conflict.<sup>68</sup>

***B. There Are No Economic Justifications for Restrictive Covenants Against Negroes. Real Property Is Not Destroyed or Depreciated Solely by Reason of Negro Occupancy and Large Segments of the Negro Population Can Afford to Live in Areas From Which They Are Barred Solely by Such Covenants. The Sole Reason for the Enforcement of Covenants Are Racial Prejudice and the Desire on the Part of Certain Operators to Exploit Financially the Artificial Barriers Created by Covenants.***

It has frequently been asserted that the racial restrictive covenant is no different in its social, economic and legal effect from the other restrictive provisions commonly found in deeds and conveyances. Thus, it is said that a grantor may reasonably and properly provide that under no circumstances shall his grantee utilize the property for industrial purposes, for purposes which create obnoxious noises or odors constituting a public nuisance, for purposes which may endanger life and limb, for purposes which contravene

<sup>67</sup> Weaver, *Chicago, A City of Covenants*, Crisis, March, 1946, p. 18. See also B. T. McGraw, "Wartime Employment, Migration and Housing of Negroes in the United States, 1941-44," National Housing Agency, Racial Relations Service Documents, Series A, No. 1, July, 1946.

<sup>68</sup> *What Caused the Detroit Riot*, National Association for the Advancement of Colored People, July, 1943.



the prevailing moral code or for other specific purposes calculated to lower the value of surrounding property in which the grantor may retain an interest. The proponents of this view imply that there are in each case economic or social justifications for the covenant imposed upon the person who receives the property.

Are there any such justifications for the racial restrictive covenants? Is it true, as has been loosely alleged, that the invasion of the Negro destroys the property? The evidence compiled by housing and real estate experts is conclusive to the contrary.

### **1. The Effect of Negro Occupancy Upon Real Property.**

This is the conclusion of one analyst:

"Already there is a body of evidence which indicates that Negroes with steady incomes who are given the opportunity to live in new and decent homes . . . instead of displaying any 'natural' characteristics to destroy better property have, if anything, reacted better towards these new environments than any other groups of similar income. Colored tenants have also displayed desirable rent-paying habits when housed in structures designed to meet their rent-paying ability. For 155 projects in 59 cities having two or more FPHA-aided projects, at least one of which is occupied by Negro tenants, the following results are reported: Collection losses do not exceed one per cent of the total operating incomes for a total of 142 of these projects, 72 of which are occupied by Negroes and 70 by white or other tenants. Five of the 13 projects showing rental losses in excess of one per cent are tenanted by Negroes and 8 are tenanted by whites or others. The collection loss records between the two racial groups do not differ more than

one per cent in 51 of the 59 cities, and the records are identical in 34."<sup>69</sup>

The National Association of Real Estate Boards recently undertook a survey of Negro housing and found that "provision for good housing for Negroes can be carried out as a sound business operation and that the Negro family that rents good housing is usually a good economic risk."<sup>70</sup> Three-fourths of the local Boards which participated in the latter survey found no reason why large insurance companies would not freely purchase mortgages upon housing occupied by Negroes.<sup>71</sup>

This same survey asked realtors if they thought that Negroes were good economic risks and if Negroes did depreciate property. Their answers can be summarized as follows:

- (1) Does the Negro make a good home buyer and carry through his purchase to completion? \* \* \* 17 of 18 cities reported *yes*.
- (2) Does he take as good care of property as other tenants of comparable status? \* \* \* 11 of the 18 cities reported *yes*.
- (3) Do you know of any reason why insurance companies should not purchase mortgages on property occupied by Negroes? \* \* \* 14 of the 18 cities reported *no*.
- (4) Do you think there is a good opportunity for realtors in the Negro housing field in your city? \* \* \* 12 of the 18 cities reported *yes*.<sup>72</sup>

<sup>69</sup> Weaver, RACE RESTRICTIVE HOUSING COVENANTS, The Journal of Land and Public Utility Economics, Vol. XX, No. 3, August, 1944, p. 189.

<sup>70</sup> Press Release No. 78, National Association of Real Estate Boards, November 15, 1944.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

There is no inevitable causal connection between race and dwelling conditions. In Washington, D. C., a small number of colored families moved about 50 years ago into Brookland, a desirable suburban section of the City. Most of them were Government employees and had stable and respectable incomes. Just prior to the recent war, many new homes were built in the area by Negroes at a cost of from \$7,500 to \$25,000. These houses are better designed and constructed than most of the existing dwellings in the neighborhood and their occupants are of a higher educational and cultural level than the majority of their white neighbors. The property values in Brookland have increased not only in the Negro community, but also in the contiguous white areas.<sup>73</sup>

Another such model community can be found in middle-class Westchester County of New York State.<sup>74</sup> New York City also contains persuasive evidence that the color of the skin of the tenants is not the determining factor in the rise of standard of dwelling conditions:

"Closest approach to satisfactory housing for Negroes in New York's five boroughs, according to William L. Carson, a realtor with long experience in the area, is the Williamsbridge section in the Bronx. Most wage earners, here, have incomes of \$3,000-4,000 per annum, most are Civil Service employees, many own their own homes, although some are rental tenants. Although seriously affected by the housing shortage, the Williamsbridge community has uniformly higher standards of dwelling conditions than are to be found in overall surveys of the other colored centers. The result is a total absence of hoodlumism, buildings kept in good condition, no evidence of slums (present or future) and a general

<sup>73</sup> Weaver, *Race Restrictive Housing Covenants*, The Journal of Land and Public Utility Economics, Vol. XX, No. 3, Aug., 1944, p. 191.

<sup>74</sup> Mummy and Phillips, *Negroes as Neighbors*, Common Sense, April, 1944, p. 134.

standard of living not much below that of average white families of comparable income."<sup>75</sup>

A similar comparison was made recently in Philadelphia, where a section recently entered by colored people was selected for study and the selling prices before and after Negro occupancy were computed in a single block. The conclusion, as reported in an article entitled "Colored Occupancy Raises Values," was as follows:

"The average sales price for the standard property in average condition, before colored occupancy was between \$2,800 and \$3,200. Today (September 1945), about six months after the first colored occupancy purchases, the average value for the same property is \$4,500 to \$5,000, with exceptional houses selling up to \$5,500 and \$6,000."<sup>76</sup>

"If we trace the development of the newer colored neighborhoods, we will find that as a new section opens up closer to the suburban section, the better-educated and higher-income group colored move there from a less desirable section. \* \* \* Thus, there is a gradual stepping up and development of the newer colored sections. This has all led to the increase in value in these sections and has stabilized all of these neighborhoods. As the process of colored expansion proceeds, the stepping-up process will continue to increase values in these newly developed colored sections."<sup>77</sup>

The origin of the fallacy that the presence of Negroes creates a decline in property values has its historical roots in the fact that Negroes are traditionally relegated to already deteriorated neighborhoods or live under such con-

<sup>75</sup> THE URBAN NEGRO: FOCUS OF THE HOUSING CRISIS, November, 1945, p. 11.

<sup>76</sup> Beebler, COLOR OCCUPANCY RAISES VALUES, The Review of the Society of Residential Appraisers, Sept., 1945, p. 4.

<sup>77</sup> Ibid., p. 6.



ditions of overcrowding (due to restrictions) as to occasion physical decay of property. In Detroit, for example, most of the principal Negro area was built before 1919 and an appreciable part of it before 1900.<sup>79</sup>

The Philadelphia Chapter of the Society of Residential Appraisers and the Wharton School of Finance conducted a joint survey in 1939 and found that *no* houses occupied by Negroes in Philadelphia could be classified as being in good residential neighborhood:

"By the time colored occupancy spreads to any neighborhood it is at least 30 years old and has the characteristics of physical and functional obsolescence that remove it from the category of a good neighborhood."<sup>80</sup>

Although it is often assumed because a particular neighborhood once housed the rich, that it was a first-class residential community when it was taken over by colored people, the evidence reveals, however, that in most instances the area had already been deserted by its original inhabitants and had started on the road to deterioration long before Negroes entered.<sup>81</sup>

<sup>79</sup> HOUSING—ANALYTICAL MAP, Detroit, Michigan, 16th Census of the United States, 1940.

<sup>80</sup> Stern, "Long Range Effect: Colored Occupancy," The Review of the Society of Residential Appraisers, January, 1945, p. 5.

<sup>81</sup> With respect to Chicago, see Cressey, *supra*, pp. 267-268; with respect to Harlem in New York City, see Kiser, *SEA ISLAND TO CITY*, Columbia University Press, 1932, pp. 19-20. This comment on the Harlem situation is also significant:

"Some have been foreclosed by the lending institutions as many as twelve times, resold for the full amount of the mortgage (for which a new mortgage is issued) and three to four thousand in cash. The new owner could readily perceive his inability to pay off a mortgage far greater than the value of his building; set about getting his original \$3-4,000 back, plus whatever he could take before the bank again foreclosed on the property. To this end, he jacks rents to the limit, cuts operating and maintenance to the very bone."—THE URBAN NEGRO: FOCUS OF THE HOUSING CRISIS, Oct., 1945, p. 13.

One other objective factor in value depreciation has been noted by economists. Our building industry has generally deemed it expedient to concentrate on the upper-income group. Since there are not as many families in this group as in the middle and lower-income groups, "the oversupply of houses (in terms of capacity to pay, not in terms of need), must be absorbed by families whose income is lower than the income of families for whom houses were designed. This means a sizeable depreciation in value must take place."<sup>82</sup>

Available and valid data are cumulative confirmation of the proposition that when economic factors are kept constant, there are no noticeable differences in the quality of property maintenance, conditions of occupancy, and neighborhood standards on property values which can be directly traced to race.<sup>83</sup>

## **2. The Ability of Negroes to Pay for Better Housing.**

It is also frequently asserted in support of racial restrictive covenants that few, if any, Negroes can afford to pay for decent housing. The restrictive covenant is therefore said to be nothing more than a formal crystallization of existing economic facts. It is argued that the Negro who can afford to move out of the Black Belt is so exceptional that a change in existing methods and procedures is not indicated.

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<sup>82</sup> Newcomb and Kyle, *THE HOUSING CRISIS IN A FREE ECONOMY*, Law and Contemporary Problems, Winter, 1947, p. 191.

<sup>83</sup> This is supported by the experience of the public housing program, the few desirable areas occupied by Negroes in cities such as Washington, Philadelphia, and New York and in the small number of well designed medium-rental housing projects available to Negroes—such as the Paul Lawrence Dunbar Apartments in New York City and the Michigan Boulevard Garden Apartments in Chicago.

This contention also fails to meet the test of analysis. In the first place, it should be noted that Negroes pay much higher rentals for the quarters which they currently occupy than do white persons in comparable units.<sup>84</sup>

Not only do Negroes pay more for desirable housing, as illustrated by the studies of Robinson and Beebler cited above, but they usually pay higher rents than whites for even the least desirable types of shelter. This has recently been substantiated for the City of Detroit:

"In his crowded flat or room in blighted Black Bottom or Paradise Valley, the Negro pays 30 to 50 per cent more than whites pay for better quarters. A family jammed into a single room, sharing toilet facilities with six other families (the legal limit in Detroit is two, but is unenforced) will pay (in 1946) from \$11 to \$16 weekly or \$47 to \$69 per month. Before rent ceilings came, landlords tripled and quadrupled monthly incomes by evicting white families and renting to Negroes."<sup>85</sup>

Moreover, Negroes spend a larger proportion of their income for rent than white persons in the same income group. These facts are brought into sharp relief by the result of a study of housing in Chicago:

"Negro residents of the Chicago 'black belt' pay as much per cubic foot per room as that paid by wealthy residents for equivalent space on Lakeside Drive."<sup>86</sup>

<sup>84</sup> For a summary of earlier data supporting this statement, see, Thomas J. Woofter, *NEGRO PROBLEMS IN CITIES*, 1928, pp. 82-87, 121-30. More recent data are presented in Moron, *Where Shall They Live?*, The American City, April, 1942, and Beebler, *Color Occupancy Raises Values*, The Review of the Society of Residential Appraisers, September, 1945.

<sup>85</sup> Velie, *op. cit.* p. 75.

<sup>86</sup> Cayton, *NEGRO HOUSING IN CHICAGO*, *Social Action*, April 15, 1940, p. 18.

Whatever may have been the differential in earnings between Negroes and whites in the lower and middle income groups prior to World War II, the industrial effort in connection with the war tended to eradicate such differential. New and better paying jobs were open to Negroes, both men and women, and earnings in all job classifications were increased.<sup>87</sup> Consequently, great numbers of Negro workers and many Negro professional and business men and women who are dependent upon the Negro community, as well as those Negroes who recently have secured white collar and professional jobs in the larger economy are now able to pay for decent housing. Consequently the number of potential Negro purchasers and tenants of decent housing is greater than formerly.

The failure of housing to meet the needs of the Negro workers has been due not to the insufficient economic means of the applicant, but rather to the lack of building sites and the consequent inability of government agencies, to erect, or to effectively encourage private industry to build new housing for Negroes. The National Housing Authority, in order to meet the problem, threatened to withdraw priorities unless Negro housing was constructed, and as a result, realtors, builders and financial institutions suddenly "discovered" a new Negro market for housing. A typical statement of this new condition is contained in a monograph published by the National Housing Authority itself:

"Current employment facts make evident an increasing number of Negroes in those income brackets which provide a profitable market for private enterprise housing. There is evidence that, in addition to their patriotic war bond purchases through volun-

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<sup>87</sup> Weaver, NEGRO LABOR: A NATIONAL PROBLEM, pp. 78-93, 112-130.



tary payroll deductions, their experience in the last depression have motivated increased savings among Negroes. The National Association of Real Estate Boards, the National Association of Home Builders, and others, now recognize that they have overlooked this growing market for decent housing among Negroes."<sup>88</sup>

The first administrator of the NHA, John B. Blandford, Jr., in the fall of 1944, spoke of "the barriers which exist even for the Negro citizen who can pay for a home, and, if permitted, could raise a family in decent surroundings," and specified "site selection, of obtaining more 'living space,'" and net income as the principal one."<sup>89</sup>

In 1945 a national survey of the housing market, which covered 41 cities and involved 9,200 interviews with Negroes living in congested and blighted areas, found that almost 40% of these persons were paying between \$50 and \$60 a month for rent. Of the entire group of persons interviewed, 43% were willing to buy new homes and 65% of them had savings of more than \$1,000.<sup>90</sup>

A similar study was made in a sample slum area in Chicago and the results were as follows:<sup>91</sup>

	No. of Tenants	%	Average Rent	Rent Paid as % of Income
Pay More Than Can Afford	24	8.4	\$30.00	25.7
Pay As Much As Can Afford	159	55.5	32.00	21.3
Willing To Pay More	104	36.1	27.00	15.4

<sup>88</sup> B. T. McGraw, *WARTIME EMPLOYMENT, MIGRATION AND HOUSING OF NEGROES IN THE UNITED STATES, 1941-1944*, *Racial Relations Service Documents*, Series A, #1, NHA, July 22, 1946.

<sup>89</sup> John B. Blandford, Jr., *The Need for Low Cost Housing*, A speech before the Annual Conference of the National Urban League, Columbus, Ohio, Oct. 1, 1944, p. 1.

<sup>90</sup> Detroit Free Press, March 20, 1945.

<sup>91</sup> *THE SLUM ... IS REHABILITATION POSSIBLE? Chicago Housing Authority*, 1946, p. 17.

The Bureau of Labor Statistics of the U. S. Department of Labor has very recently made a survey of Negro Veterans of World War II, their incomes and their needs and desires with respect to the occupancy of dwelling units. The results of this survey in Detroit, for example, indicate very graphically the extent to which many Negroes could enter the housing market if they were not excluded therefrom artificially. If housing is available during the next twelve months, only at present price and quality, 21 out of every 100 Negro veterans would buy or build, and 15 would plan to move and rent. If they could find what they wanted, 49 out of every 100 would buy or build (as contrasted to 22 out of every 100 in the total population), and 14 would move and rent. Those who would buy or build, if they could find what they want, reported that the average or medium price which they could afford was \$5,500 and  $\frac{1}{4}$  of them could pay \$6,000 or more.<sup>92</sup> Certainly, these statistics do not support the proposition that the inhabitants of the Black Belt of Detroit are, of necessity, required to remain in sub-standard housing for lack of economic means.

The following chart is drawn from the Bureau of Labor Statistics survey mentioned above. A similar survey with respect to the St. Louis area issued on May 19, 1947, and two surveys issued by the Bureau of the Census of the Department of Commerce relating to all World War II veterans have been made.

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<sup>92</sup> SURVEY OF NEGRO WORLD WAR II VETERANS AND VACANCY AND OCCUPANCY OF DWELLING UNITS AVAILABLE TO NEGROES IN THE DETROIT AREA, MICHIGAN, JANUARY, 1947, *U. S. Department of Labor*, May 20, 1947, p. 1.

	DETROIT		St. Louis	
	AH <sup>a</sup>	Negro <sup>b</sup>	All <sup>c</sup>	Negro <sup>d</sup>
Living in Rented Rooms, Trailers, or Tourist Cabins	17%	16%	8%	7%
Living in Ordinary Dwelling Units	83%	84%	92%	93%
Doubled Up	19%	22%	22%	31%
Not Doubled Up	64%	62%	70%	62%
Substandard *	6%	26%	19%	63%
Median Gross Rent	\$43.00	\$39.00	\$32.00	\$24.00
Plan to Move **	31%	63%	25%	35%
To Rent	9%	14%	13%	25%
To Build or Buy	22%	49%	12%	10%
Median Gross Rental They Could Pay	\$46.00	\$40.00	\$39.00	\$25.00
Median Price They Could Pay	\$6,300	\$5,500	\$6,500	\$3,800

\* Substandard: Needing major repairs or unfit for use, or lacking private bath or toilet, or running water in the dwelling unit.

\*\* Plan to move if housing is available at the price and quality veterans desire.

<sup>a</sup> Ibid.

<sup>b</sup> SURVEY OF WORLD WAR II VETERANS AND DWELLING UNIT VACANCY AND OCCUPANCY IN THE DETROIT AREA, MICHIGAN, U. S. Department of Commerce, October 31, 1946, p. 1.

<sup>c</sup> SURVEY OF WORLD WAR II VETERANS AND DWELLING UNIT VACANCY AND OCCUPANCY IN THE ST. LOUIS AREA, MISSOURI, U. S. Department of Commerce, November 26, 1946, p. 1.

<sup>d</sup> SURVEY OF NEGRO WORLD WAR II VETERANS AND VACANCY AND OCCUPANCY OF DWELLING UNITS AVAILABLE TO NEGROES IN ST. LOUIS AREA, MISSOURI AND ILLINOIS, NOVEMBER-DECEMBER, 1946, U. S. Department of Labor, May 19, 1947, p. 1.

At the end of the war, income distribution among colored American citizens in the northern urban centers more nearly approximated that obtaining for the entire population than ever before. The number and proportion of Negroes well above the subsistence level had increased greatly. The sampling of Negro veterans referred to above is ample demonstration of this tendency. Racial restrictive covenants, at least insofar as Negroes are concerned, cannot be justified on the grounds of inability to pay:

"The peculiar intensity of the housing problems of Negroes is not due to their disproportionately low

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incomes alone. The really distinctive factor underlying these problems stems from the fact that, among the basic consumer goods, only for housing are Negroes traditionally excluded from freely competing in the open market. Consequently, not only do the majority of Negroes live in low-rent substandard housing, but even when colored families can afford rents which normally assure decent shelter, they are often denied it."<sup>93</sup>

There is no validity to the assumption that racial restrictive covenants can be justified in terms of the economics of residential real estate. Negro occupancy does not in itself destroy or depreciate the property. Large numbers of Negroes can afford to enter the free housing market. The only significant economic fact which the available data confirm is that traditionally Negroes have been forced to pay a larger portion of their income and a larger absolute price for smaller value and for substandard dwelling. Racial prejudice and the desire to profit by it are at the root of all restrictive covenants aimed at Negroes.

Thus Negroes are able to pay for better housing in large numbers, but the wall of racial covenants that surrounds their areas of concentration and excludes them from most newly constructed suburban housing prevent their securing it. This is no temporary phenomenon of a general housing shortage. It is an historic fact and will persist as long as racial covenants are enforced by the courts and given "respectability" by implied legality. Such a situation not only extracts gross social and economic costs from Negroes and the whole community, but it accentuates the frustrations of colored Americans that inevitably follow from the color-caste system.

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<sup>93</sup> Weaver, CHICAGO: A CITY OF COVENANTS, *Crisis*, March, 1946, p. 76.



## VI

# **Judicial Enforcement of This Restrictive Covenant Violates the Treaty Entered Into Between the United States and Members of the United Nations Under Which the Agreement Here Sought to Be Enforced Is Void.**

By Articles 55 and 56 of the United Nations Charter, each member nation of that body is pledged to take joint and separate action to promote:

“Universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.”

While the Charter recognizes the sovereignty of the members, it states at the outset:

“All members, in order to insure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations in accordance with the present Charter.”<sup>1</sup>

This solemn international compact was described by the Michigan Supreme Court as merely, “indicative of a desirable social trend and an objective devoutly to be desired by all well-thinking people” (R. 67).

In addition to the decisions of this Court defining human rights to include the right of colored persons to own and use property,<sup>2</sup> the provisions of the United Nations Charter have been similarly construed by authorities.<sup>3</sup> For example,

<sup>1</sup> United Nations Charter, Article 2, Paragraph 2.

<sup>2</sup> See Point II of this brief.

<sup>3</sup> See January, 1946 issue of 243 *Annals of the American Academy of Political and Social Science*, on “Essential Human Rights,” particularly articles by Edward R. Stettinius, Jr., p. 1, Charles E. Merriam, p. 11.

the American Law Institute interprets the provisions of Article 55 to include the right of every person to adequate housing.<sup>4</sup>

The United Nations Charter is a treaty, duly executed by the President and ratified by the Senate (51 Stat. 1031). Under the Constitution such a treaty is the "supreme Law of the Land" and specifically, "the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."<sup>5</sup>

In the face of this provision, the Michigan Supreme Court stated that it is not a principle of law that a treaty between sovereign nations, "is applicable to the contractual rights between citizens when a determination of these rights is sought in State courts" (R. 67).

Historically, however, no doubt has been entertained as to the supremacy of treaties under the Constitution. Thus Madison, in the Virginia Convention, said that if a treaty does not supersede existing state laws, as far as they contravene its operation, the treaty would be ineffective.

"To counteract it by the supremacy of the state laws would bring on the Union the just charge of national perfidy, and involve us in war."<sup>6</sup>

More recently, in holding that the public policy of New York against confiscation of private property could not prevent the United States from collecting a debt assigned to it by the Soviet Government in an exchange of diplomatic correspondence, this Court stated:

"Plainly the external powers of the United States are to be exercised without regard to state laws or

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<sup>4</sup> American Law Institute, 243 *Annals of the American Academy of Political and Social Science*. See also in the *Annals*, C. Wilfred Jenks, "The Five Economic and Social Rights," pp. 43-45.

<sup>5</sup> Article VI, Section 2.

<sup>6</sup> 3 *Elliot's Debates* 515.

policies. \* \* \* In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the state of New York does not exist. Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, State Constitutions, state laws, and state policies are irrelevant to the inquiry and decision."<sup>7</sup>

Early in the history of our foreign relations, treaty obligations of the federal government operated to affect the common law and statutory rights of American citizens to inherit property,<sup>8</sup> to rely upon a rule of admiralty law,<sup>9</sup> and to void the defense that a debt revived by treaty had been paid to the state which had expropriated it during the Revolution.<sup>10</sup>

The treatment of minority citizens within the border of a sovereign state is the proper subject of international negotiations and is a subject directly affecting international relations. The question arose, in view of the Nazi extermination policy, whether, "sovereignty goes so far that a government can destroy with impunity its own citizens and whether such acts of destruction are domestic affairs or matters of international concern."<sup>11</sup> That question was resolved by the human rights provisions of the United Nations Charter, and by the subsequent adoption by the United Nations General Assembly of a resolution affirming

<sup>7</sup> *U. S. v. Belmont*, 301 U. S. 324, 331.

<sup>8</sup> *Hauenstein v. Lynham*, 100 U. S. 483; *Geoffroy v. Riggs*, 133 U. S. 258. This doctrine has been strongly reiterated in *Clark v. Allen*, 67 Sup. Ct. 1431 (Advance Sheets).

<sup>9</sup> *The Schooner Peggy*, 5 U. S. 103.

<sup>10</sup> *Ware v. Hylton*, 3 Dall. 199.

<sup>11</sup> Raphael Lemkin, "Genocide as a Crime under International Law," *Am. J. of Int. Law*, Vol. 41, No. 1 (Jan., 1947), p. 145.

the principles that genocide is a crime under International Law whether committed by private individuals, public officials or statesmen.<sup>12</sup> This resolution changes fundamentally the responsibility of a sovereign nation toward its citizens.<sup>13</sup> While the Nuremberg trials were confined in scope to acts committed after the commencement of war or in preparation for it, the inclusion of persecution of German nationals in crimes against humanity indicates that the field of international affairs has been broadened to include domestic activity of a nation.

Official spokesmen for the American State Department have expressed concern over the effect racial discrimination in this country has upon our foreign relations and the then Secretary of State Stettinius pledged our government before the United Nations to fight for human rights at home and abroad.<sup>14</sup>

The interest of the United States in the domestic affairs of the nations with whom we have signed treaties of peace following World War II can be seen from the provisions in the peace treaties with Italy, Bulgaria, Hungary and Rumania, and particularly with settlement of the free territory of Trieste, in all of which we specifically provided for governmental responsibility for a non-discriminatory practice as to race, sex, language, religion, and ethnic origin.<sup>15</sup>

<sup>12</sup> Resolution of General Assembly of United Nations, Dec. 11, 1946.

<sup>13</sup> Lemkin, *op. cit.*, p. 150.

<sup>14</sup> McDiarmid, "The Charter and the Promotion of Human Rights,"

14 State Department Bulletin 210 (Feb. 10, 1946); and Stettinius' statement, 13 *State Department Bulletin*, 928 (May, 1945). See also letter of Acting Secretary of State Dean Acheson to the F. E. P. C. published at length in the Final Report of F. E. P. C., reading in part, "the existence of discrimination against minority groups in this country has an adverse effect upon our relations with other countries."

<sup>15</sup> See description of these provisions in, "Making the Peace Treaties, 1941-1947" (Department of State Publications 2774, European Series 24); 16 *State Department Bulletin* 1077, 1080-82.



The Potsdam Declaration provided for the abolition of all Nazi laws establishing racial or religious discrimination, "whether legal, administrative or otherwise."

This growth in international law has established that it is now proper for the executive arm of the United States Government to enter into treaties affecting the treatment of citizens of the United States within its own boundaries. There was never any question, however, that at all times the United States could by treaty protect and extend the rights of nationals of other states residing in this country, and as to covenants running against the foreign born of many nations, such power has always existed.

The Supreme Court of Michigan stated (R. 67) that treaties do not affect the contractual rights between citizens "when a determination of these rights is sought in state courts." Such a contention was reviewed and rejected by this Court in *Kennett v. Chambers*,<sup>16</sup> where this Court declared void a contract under which an American citizen sought to collect sums due him under an agreement by which he furnished funds to equip a Texan to fight Mexico during the life of treaties of friendship and comity between Mexico and this country. This Court held the contract void, saying:

"These treaties, while they remained in effect, were the Supreme law and binding not only on the government but upon every citizen. No contract could lawfully be made in violation of their provisions. For, as the sovereignty resides in the people, every citizen is a portion of it, and is himself personally bound by the laws which the representatives of the sovereignty may pass or the treaties they may enter within the scope of their delegated authority . . . It is his own personal compact as a portion of the sovereignty in whose behalf it is made" (p. 50).

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<sup>16</sup> 55 U. S. 38. See also: *Mayer v. White*, 65 U. S. 317.

In an early case, this Court held that an American citizen who had acted as master of a foreign vessel privateering against Spanish ships could not be, "recognized in our courts as a legal claimant of the fruits of his own wrong" in libel proceedings, because of treaty provisions between this country and Spain.<sup>17</sup>

This principle was applied to an attempted enforcement of a deed restriction against leasing to Chinese and a federal judge there said that the restriction was void because it contravened the terms of a treaty by which Chinese subjects were accorded all the rights, privileges and immunities accorded citizens of the most favored nation.<sup>18</sup>

Within the framework of our federal form of government, there may be fields in which enabling legislation is required to implement the solemn obligations of the human rights sections of the United Nations Charter. But the decisions of this Court leave no doubt that a contract by its own terms violative of the treaty obligations of the United States is void.

Even were it not established that the individual's right to enter into contracts in violation of treaties is restricted, certainly such contracts cannot be enforced by resort to the power of the state's judiciary since the states have divested themselves of all authority in connection with international relations and have agreed that for their mutual protection, this authority must be vested solely in the federal government.

Such a decision was reached by the Court of another member of the United Nations, the Ontario Supreme Court, when it held unenforceable a restriction against ownership

<sup>17</sup> *The Bello Corruñes*, 19 U. S. 152.

<sup>18</sup> *Gandolfo v. Hartman*, 49 Fed. 181.

of land by, "Jews or persons of objectionable nationality."<sup>19</sup>

The attempt by the courts of the various states to aid private individuals in the prosecution of a course of action utterly destructive of the solemn treaty obligations of the United States must be struck down by this Court or America will stand before the world repudiating the human rights provisions of the United Nations Charter and saying of them that they are meaningless platitudes for which we reject responsibility.

### Conclusion

This Court in 1917 declared unconstitutional efforts of the states to establish residential segregation by legislative enactments. Residential segregation by state court enforcement of racial restrictive covenants has spread over large areas and has excluded numerous groups. Continued enforcement of these covenants will firmly establish ghettos in this country.

Respondents' only basis for relief is the racial restrictive covenant which is ineffective without state action through its courts. The only basis for the decree of the courts of Michigan is the race of petitioners. If all other facts in the present record had been the same except that petitioners happened to be members "of the Caucasian race," the same courts of Michigan would have used all of the resources of the State of Michigan to protect them fully in their right to use and occupy their property.

The enforcement of racial restrictive covenants clearly violates the Fourteenth Amendment. The denial to petitioners of their rights guaranteed by the Fourteenth Amend-

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<sup>19</sup> In *Re Drummond Wren*, 4 D. L. R. 674 (1945).

ment is a part of a general pattern of enforcement of similar covenants blanketing large sections of our country. This case is not a matter of enforcing an isolated private agreement. It is a test as to whether we will have a united nation or a country divided into areas and ghettos solely on racial or religious lines. To strike down the walls of these state court imposed ghettos will simply allow a flexible way of life to develop in which each individual will be able to live, work and raise his family as a free American.

It is the protection by the Constitution of this basic human freedom which makes possible the functioning of a democratic economic and political system based on private property.

WHEREFORE, it is respectfully submitted that the judgment of the Supreme Court of Michigan should be reversed.

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## Petitioners' Appendix A

Total Population, Non-White Population, Percentage of Non-White Population and Percentage of Total Dwelling Units Occupied by Non-Whites in Selected Northern and Border Metropolitan Districts, 1940 and 1947.

Metropolitan District	Total Population <sup>a</sup>		Non-White Population <sup>a</sup>		Per Cent. of Non-White in Total Population <sup>a</sup>		Per Cent. of Total Dwelling Units Occupied by Non-Whites <sup>b</sup>	
	1940	1947	1940	1947	1940	1947	1940	1947
New York-Northern New Jersey	11,014,511	11,669,409	675,969	1,015,002	6	8	6	8
Chicago	4,499,126	4,644,640	329,157	447,370	7	10	7	8
Los Angeles	2,904,596	3,916,875	127,477	240,375	4	6	4	4
Philadelphia	2,898,644	3,372,690	317,285	439,410	7	13	7	11
Detroit	2,295,867	2,702,398	171,877	348,245	7	13	7	11
Pittsburgh	1,994,060	2,100,092	115,423	131,052	6	6	6	6
St. Louis	1,367,977	1,584,044	150,088	239,470	11	15	11	15
Baltimore	1,046,692	1,306,040	188,106	284,383	18	22	16	18
Washington	907,816	1,205,220	215,398	285,988	24	24	19	20
Seattle	452,639	602,910	15,417	24,090	3	4	3	3
Portland, Ore.	406,406	534,422	6,696	11,268	2	2	1	2
Youngstown	372,428	380,897	23,008	29,915	6	8	6	8
Columbus	365,796	432,304	38,246	40,795	9	11	9	8
Akron	349,705	423,539	14,317	27,343	4	6	4	5
Toledo	341,663	383,418	15,245	20,196	4	5	4	4

<sup>a</sup> Source: *Current Population Reports, Population Characteristics*, U. S. Bureau of the Census, Series P. 21, 1947.

<sup>b</sup> Source: *Current Population Reports, Housing*, U. S. Bureau of the Census, Series P. 71, 1947.

The 1940 figures are based on 16 Census enumerations for April, 1940; the 1947 figures are U. S. Census estimates for April, 1947.

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CHARLES CLAUDE BROWLEY  
CLERK

In the

# Supreme Court of the United States

OCTOBER TERM, 1946

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No. 1363  
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37

ORSEL MCGHEE and MINNIE S. MCGHEE, his wife,  
Petitioners,

vs.

BENJAMIN J. SIPES and ANNA C. SIPES, et al.,  
Respondents

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**RESPONDENTS**  
**BRIEF FOR ~~DEFENDANTS~~ IN OPPOSITION**  
**TO PETITION FOR WRIT OF**  
**CERTIORARI**  
---

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In the  
**Supreme Court of the United States**

OCTOBER TERM, 1946

No. 1363

ORSEL MCGHEE and MINNIE S. MCGHEE, his wife,  
Petitioners,

vs.

BENJAMIN J. SIPES and ANNA C. SIPES, et al.,  
Respondents

~~DEFENDANTS~~  
**BRIEF FOR RESPONDENTS IN OPPOSITION  
TO PETITION FOR WRIT OF  
CERTIORARI**

**STATEMENT OF THE CASE**

Petitioners statement of facts is substantially correct except:

(a) It should be noted that the deed by which petitioners acquired title, dated November 30, 1944, was made and accepted, "*Subject to existing restrictions as of record*" (R. 67), and the restriction in question was recorded September 7, 1935 (R. 63).

(b) The statement that "Similar agreements were executed on forty-nine lots . . . within the subdivision in which the lot . . . is located" (Petitioners' brief, page 4, line 3) is incorrect. The word, "subdivision," should be "block" (R. 53). The block is a single city block, which, on both sides of the street has 53 lots (R. 53, 54, 30). Under Wayne County Circuit Court Rule 14 (b), a synopsis of public records submitted as a pre-trial statement is admissible in evidence as admitted facts except insofar as its inaccuracy shall be pointed out under oath. This block is located in a large white residential area with restrictions uniform as to all properties subject thereto.

## ARGUMENT

### I.

#### NO CONSTITUTIONAL OR OTHER FEDERAL QUESTION OF SUBSTANCE IS PRESENTED

The restrictive agreement involved in this case does not affect sale or ownership. It relates only to use and occupancy (R. 63). It is a private contract, between private individuals, regarding their own private property (R. 58-63). The property was so restricted when purchased by petitioners and their deed conveyed it to them "subject to existing restrictions as of record" (R. 67).

In *Corrigan v. Buckley*, 271 U. S. 323, this court was asked to rule unconstitutional a racial restrictive covenant similar in legal effect to the one here involved for the same reasons that petitioners now urge upon the court. This court there said, on pages 329-330:

"Under the pleadings in the present case the only constitutional question involved was that arising under the assertions in the motions to dismiss that the indenture or covenant which is the basis of the bill, is 'void' in that it is contrary to and forbidden by the 5th, 13th and 14th Amendments. This contention is entirely lacking in substance or color of merit. \* \* \* It is obvious that none of these Amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property; and there is no color whatever for the contention that they rendered the indenture void."

Since 1926, when the *Corrigan* case was decided, this court has on several occasions refused to grant certiorari in similar cases.

- Mays v. Burgess*, 152 F. 2nd 123.  
*Certiorari denied*, 325 U. S. 868.  
*Grady v. Garland*, 89 F. 2nd 817.  
*Certiorari denied*, 302 U. S. 694.  
*Cornish v. O'Donoghue*, 30 F. 2nd 983.  
*Certiorari denied*, 279 U. S. 871.  
*Russell v. Wallace*, 30 F. 2nd 981.  
*Certiorari denied*, 279 U. S. 871.

Neither is there any diversity of opinion on this point as every court of last resort in the United States to which this question has ever been submitted has ruled that racial restrictions against use and occupancy are not unconstitutional.

- Corrigan v. Buckley*, 271 U. S. 323; 46 S. C. 521, 70 L. Ed. 969.  
*Wyatt v. Adair*, 215 Ala. 365, 110 So. 801.  
*Wayt v. Patee*, 205 Cal. 46, 269 Pac. 660.  
*Shindler v. Roberts*, 69 Cal. App. 2nd 549, 160 Pac. 2nd 65.  
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*Lyons v. Wallen*, 191 Okla. 567, 133 Pac. 2nd 555.  
*Doherty v. Rice*, 240 Wis. 389, 3 N. W. 2nd 734.  
*Dooley v. Savannah Bank & Trust Co.*, 199 Ga.  
 353; 34 S. E. 2nd 522.  
*Lions Head Lake Co. v. Brzezinski* (N. J.), 43 Atl.  
 2nd 729.

And by dictum:

*Clark v. Vaughn*, 131 Kan. 438, 292 Pac. 783.  
*Eason v. Buffalo*, 198 N. C. 520, 152 S. E. 496.  
*White v. White*, 108 W. Va. 128, 150 S. E. 531.  
*Burke v. Kleiman*, 277 Ill. App. 519.

For complete digest see note to:

*Mays v. Burgess*, 162 A. L. R. 180.

## II.

### JUDICIAL ENFORCEMENT OF A VALID PRIVATE AGREEMENT DOES NOT VIOLATE THE CONSTITUTION

Petitioners urge that the courts cannot enforce such restrictive agreements, because the Judiciary is a branch of the Government, and cite in support of the proposition the case of *Buchanan v. Warley*, 245 U. S. 60, a case involving an ordinance of the City of Louisville, Kentucky, requiring segregation of the races. We quote the portion of the opinion which states the issue:

"The concrete question here is: May the occupancy, and, necessarily, the purchase and sale of property of which occupancy is an incident, be inhibited by the State, or by one of its municipalities, solely because of the color of the proposed occupant of the premises?"

It seems too obvious to require argument that cases involving the enforcement of an ordinance or a law bear no legal resemblance to cases enforcing a private contract.

The obligations imposed on parties by their own contracts would, if imposed upon them by statute, be clearly unconstitutional in the vast majority of cases. No court would enforce a statute requiring A to sell his house to B, yet the courts without question enforce A's contract to sell his house to B.

When the court enforces a law, whether it be legislative law, judge made law or common law, the effect is to control the actions of the individual without regard to his personal consent. But when a court enforces a contract, the indispensable prerequisite is the individual's voluntary agreement, either express or implied, to do that which the court decrees he shall do.

Petitioners' contention is not new. It was considered in *Corrigan v. Buckley*, at page 331, where the court said:

"And while it was further urged in this court that the decrees of the courts below in themselves deprived the defendants of their liberty and property without due process of law . . . it was not raised by the petition for the appeal or by any assignment of error either in the court of appeals or in this court; and it likewise was lacking in substance."

This final clause may be dictum but it is a clear cut expression of this court's opinion that the contention is lacking in substance.

The claim, that judicial enforcement of the restriction violates the Constitution fails if it be conceded, as it must be under the ruling in *Corrigan v. Buckley*, that the restriction is a valid contract and not unconstitutional.

Petitioners, in their briefs filed in the Michigan Supreme Court, conceded its validity, saying: "The discriminatory agreements . . . that exclude negroes . . . from buying or occupying residential property, so long as they remain purely private agreements, are not unconstitutional." (Graves and Dent brief, pages 45-46.) "We do not argue that the contract itself violates the Constitution." (Marshall, Robinson and Perry brief, page 10.)

We have examined all the cases cited in petitioners' brief and none of them involves the constitutionality of a private contract, excepting *Corrigan v. Buckley*. Petitioners have not cited and cannot cite one case where any court of last resort in the United States has ever held that the enforcement of a valid contract was State action prohibited by the Constitution or any of its Amendments.

### III.

#### THE PUBLIC POLICY OF THE UNITED STATES

Jurisdiction of this court is invoked under Section 237 of the Judicial Code as amended (28 U. S. Code 344-b). The applicable parts of that section read:

"It shall be competent for the Supreme Court by certiorari to require that there be certified to it for review . . . any cause wherein . . . any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or status of or commission held or authority exercised under the United States."

Petitioners fail to show jurisdiction within the terms of this section in that their claim is based on "public policy," which is not mentioned in the statute.

Further than this, no claim under the public policy of the United States was made or specifically set up in the Michi-

gan courts, nor was such claim passed upon by them. We have searched petitioners' brief in vain for any reference to the record where the public policy of the United States is mentioned and contend it is not properly before this court.

But if it were properly before the court it would avail petitioners nothing because in *Corrigan v. Buckley*, 271 U. S. 323, near the bottom of page 330, this court said:

"And, plainly . . . the contention, earnestly pressed, that the indenture is void as being 'against public policy,' does not involve a constitutional question within the meaning of the Code provision."

The sociological problems argued under Section II-B of petitioners' brief are not mentioned in the pleadings, were not raised on the trial, were not urged by petitioners in the Michigan Supreme Court (raised only by *Amicus Curiae*), and the alleged facts (statistics) on which they are based were not offered in evidence. In short, these matters are no part of the record and are not properly before this court.



## IV.

**THE DECISION OF THE MICHIGAN COURT IS CORRECT AND IN  
ACCORD WITH THE DECISIONS OF THIS COURT AND OF  
ALL OTHER STATE SUPREME COURTS**

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The decision of the Supreme Court of Michigan conforms to the settled rule of property which has existed in Michigan during most of the life of the State (Opinion of Michigan Supreme Court in this case, R. 92). It is also in agreement with settled rules of property in the District of Columbia and every State of the Union in which the question has ever been submitted to the courts (citations on pages 4 and 5 of this brief).

If petitioners feel that Michigan's public policy as expressed in this and former decisions of her Supreme Court ought to be changed, their arguments should be addressed to the Michigan legislature. They are clearly asking this Court, by judicial decision, to change a well established local rule of property; to legislate instead of adjudicate.

For the foregoing reasons it is respectfully submitted that the petition for certiorari should be denied.

**LLOYD T. CHOCKLEY,  
HENRY GILLIGAN,  
JAMES A. CROOKS,**  
*Attorneys for Respondents.*

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1947.

\_\_\_\_\_  
No. 87.  
\_\_\_\_\_

ORSEL MCGHEE AND MINNIE S. MCGHEE, his wife,  
*Petitioners,*

v.

BENJAMIN J. SIPES AND ANNA C. SIPES, JAMES A. COON AND  
ADDIE A. COON; Et AL, *Respondents.*

\_\_\_\_\_  
**BRIEF FOR RESPONDENTS.**  
\_\_\_\_\_

HENRY GILLIGAN,  
JAMES A. CROOKS,  
*Attorneys for Respondents.*

December 1, 1947.



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ADDIE A. COON, ET AL., *Respondents.*

---

**BRIEF FOR RESPONDENTS.**

---

Petitioners' Statement of the Case is substantially correct.

**STATEMENT OF THE FACTS.**

Respondents deem a more detailed Statement of the Facts than that of petitioners desirable:

Respondents Benjamin J. Sipes, Anna C. Sipes, and others own and occupy property located in Seebaldt's subdivision and Brooks & Kingdon's subdivision on Seebaldt Avenue, between Firwood and Beechwood Avenues, in the City of Detroit.

Petitioners Orsel McGhee and Minnie S. McGhee, his wife, Negroes, own and occupy property located on the same street in Seebaldt's subdivision. All of the properties occupied by the parties hereto are encumbered by the following recorded covenant:

"This property shall not be used or occupied by any person or persons except those of the Caucasian race."

Mutual agreements imposing the above restriction, covering many more than the required 80 per cent of the property fronting on both sides of Seebaldt Avenue, were recorded in the office of the register of deeds of Wayne County on September 7, 1935. The deed running to petitioners, dated November 30, 1944 and recorded December 1, 1944, is "subject to existing restrictions as of record." Recourse to the courts followed their refusal to move from the property.

### **SUMMARY OF THE ARGUMENT.**

1. The restrictive agreement is valid and enforceable in equity by injunction.
  - (a) The restrictive agreement creates an equitable right arising under contract and its validity is uniformly recognized.
  - (b) Restrictive agreements are compatible with the declared public policy of the State of Michigan; there is no applicable Federal policy.
  - (c) The Fourteenth Amendment of the Constitution of the United States and implementing statutes do not prohibit judicial enforcement of the restriction.
2. Social and political problems of a State must be addressed to the legislature—not the courts.

## ARGUMENT.

### 1. The Restrictive Agreement is Valid and Enforceable in Equity by Injunction.

(a) The restrictive agreement creates an equitable right arising under contract and its validity is uniformly recognized.

Primarily, petitioners attack the validity of the restrictive agreement here involved on the ground that it denies them their property in contravention of the Fourteenth Amendment of the Federal Constitution and implementing legislation. It would appear they call upon the full context of the Amendment, but the cases cited by them largely relate to the "due process clause" of that Amendment. Clearly they misconceive the true meaning of the Amendment as demonstrated by the consistent adjudications of this Court relating thereto; they confuse *state* action with *private* action.

There is a fundamental and important distinction between Constitutional limitations on a State and the freedom of contract among private individuals relating to private property.

The properties owned by respondents and petitioners were impressed with a restriction in the form of a contract, duly recorded among the land records, restricting for a limited period of time the use and occupancy of all the properties included therein to persons of the Caucasian Race. It is conceded by petitioners they took title with notice of the restriction, and that they had no pre-existing rights therein.

What then can they claim to be their right to use and occupy the property in the face of a pre-existing enforceable right in others whose properties are burdened with a like restriction, reciprocal as to all?

They rely on the case of *Buchanan v. Warley*, 245 U. S. 60, which involved the constitutionality of an ordinance of the City of Louisville, Kentucky, which undertook to legis-



late the separation of the races by limiting the sale and use of property in residential districts. The sole issue was whether this was a legitimate exercise of the police power of the State. This Court decided the case squarely on that point, at page 82:

"We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law. That being the case the ordinance cannot stand."

This case involved an attempt by the legislature to limit the ownership, and necessarily the use, of property. Similarly, in *Harmon v. Tyler*, 273 U. S. 668 and *City of Richmond v. Deans*, 281 U. S. 704, the States attempted by somewhat different forms to accomplish the same result by legislation. The legislation in each case was invalidated by a *per curiam* decision of this Court on the authority of *Buchanan v. Warley*, *supra*.

It can only be deliberate error on petitioners' part to urge that these decisions give credence to their contentions. This Court did no more than recognize that legislative action of a State, based solely on color, was repugnant to the Fourteenth Amendment forbidding any State to deprive any person of life, liberty or property without due process of law. But this is not to say that private contracts, whether in the form here involved, or of other types, are repugnant to that Amendment.

And in 1944, consistent with the decision in *Buchanan v. Warley*,<sup>1</sup> this Court, in construing the New York Civil Rights Act, providing for non-discrimination in labor union membership because of collective bargaining, stated:

"A judicial determination that such legislation violated the Fourteenth Amendment would be a distortion

<sup>1</sup> 245 U. S. 60.

of the policy manifested in that Amendment *which was adopted to prevent State legislation designed to perpetuate discrimination on the basis of race or color.*" (Italics supplied) *Railroad Mail Ass'n. v. Corsi*, 326 U. S. 88.

The Fourteenth Amendment is a direct prohibition on State action and has no reference to the actions of individuals in their relations one with another. This distinction has been consistently recognized.

*Slaughter House Cases*, 16 Wall. 36

*U. S. v. Cruikshank*, 92 U. S. 542

*In Re. Virginia*, 100 U. S. 313

*Virginia v. Rives*, 100 U. S. 313

*U. S. v. Harris*, 106 U. S. 629

*Plessy v. Ferguson*, 163 U. S. 537

The Supreme Court of Michigan in this case recognized this fundamental difference between the acts of a State under the Federal Constitution and the acts of individuals relating to their private rights. This suit is not based on a statute of the State, nor is petitioners' defense based on a statute of the State. The rights being asserted by respondents are those fundamental rights which guarantee to all citizens the freedom to contract with respect of their property and, with the assurance that if such contracts are not repugnant to the Constitution and statutes, both Federal and State, they will be enforced.

Neither the Congress nor the Michigan Legislature has adopted any statutes which are addressed to the right of individuals to contract with respect of their property in the manner here involved. Under similar circumstances the State courts have uniformly sustained the validity of restrictive agreements entered into by individuals with respect of their property,<sup>2</sup> and it is now a recognized rule

<sup>2</sup> *Burkhardt v. Lofton* (1944) 63 Cal. App. (2d) 230, 146 P. (2d) 720; *Shileler v. Roberts* (1945) 69 Cal. App. (2d) —, 160 P. (2d) 67; *Stone v. Jones* (1944) 66 Cal. App. (2d) 264, 152 P. (2d) 19; *Los Angeles Investment Co. v. Gary*, 181 Cal. 680, 186 P. 596; *Chandler v. Zeigler* (1930) 88 Colo. 1, 291 P. 822; *Steward v.*

of property. The Supreme Court of Michigan has recognized that such restrictions on the use and occupancy of private property are valid.<sup>3</sup> In *Parmlave v. Morris*, *supra*, the Michigan Court, in disposing of the contention that a similar restriction was repugnant to the Constitution and discriminatory, sustained the injunction issued by the trial court:

"We think the counsel has entirely misapprehended the issue involved. Suppose the situation was reversed, and some negro who had a tract of land platted it and stated in the recorded plat that no lot should be occupied by a Caucasian, and that the deeds that were afterwards executed contained a like restriction; would any one think that dire results to the white race would follow an enforcement of the restrictions? In the instant case the plat of land containing the restriction was of record. It was also a part of defendant's deed. He knew or should have known all about it. He did not have to buy the land, and he should have not bought it unless willing to observe the restrictions it contained.

"The issue involved in the instant case is a simple one, i.e., shall the law applicable to restrictions as to occupancy contained in deeds to real estate be enforced, or shall one be *absolved from the provisions of the law* simply because he is a negro? The question involved is purely a legal one, and we think it was rightly solved by the chancellor under the decisions found in his opinion." (Italics supplied).

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Cronan (1940) 105 Colo. 393, 98 P. (2d) 999; *Dooley v. Savannah Bank and Trust Co.* (1945) — Ga. —, 34 S. E. (2d) 522; *Queensborough Land Co. v. Cazeaux*, 136 La. 724, 67 So. 641; *Meade v. Dennistone* (1938) 173 Md. 295, 196 A 330 (Distinguishing private agreements from State legislation and city ordinances); *Porter v. Johnson* (1938) 232 Mo. App. 1150, 115 S. W. (2d) 529; *Lion's Head Lake v. Brezezinski* (1945) 23 N. J. Mis. R. 290, 43 A (2d) 729; *Ridgeway v. Cockburn* (1937) 296 N. Y. Supp. 936; *Hemsley v. Hough* (1945) — Okla. —, 156 P. (2d) 182 (Distinguishing restrictions created by private contract and race segregation ordinances); *Hemsley v. Sage* (1944) 194 Okla. 669, 154 P. (2d) 577.

<sup>3</sup> *Porter v. Barrett* (1925) 233 Mich. 373, 206 N. W. 532; *Parmlave v. Morris* (1922) 218 Mich. 625, 188 N. W. 330; *Ericksen v. Tapert* (1912) 172 Mich. 457, 138 N. W. 330.

Nor can petitioners' contention, that restrictive agreements are unenforceable where the parties to the action were not parties to the agreement, be sustained. The identical proposition was unsuccessfully urged in *Ericksen v. Tapert*, (1912) 172 Mich. 457, 138 N. W. 330; *Mays v. Burgess*, 79 App. D. C. 343, 147 F. (2d) 869, (certiorari denied, 325 U. S. 868); and in *Meade v. Dennistone*, 173 Md. 295, 196 A. 330.

"The expressed purpose of the contract, and the fact that it was so executed as to entitle it to record clearly demonstrates that it was intended to be binding not alone upon the signers but upon all their successors in title as well. That the remedy may be had by and against grantees of the respective parties is authoritatively settled."

*Ericksen v. Tapert, supra.*

And the United States Court of Appeals for the District of Columbia observed:<sup>4</sup>

"The form of the covenant is immaterial and it is not necessary it should run with the land. 'A personal covenant or agreement will be held valid and binding in equity on a purchaser taking the estate with notice. It is not binding upon him merely because he stands as an assignee of the party who makes the agreement, but because he has taken the estate with notice of a valid agreement concerning it which he cannot equitably refuse to perform.' *Bryan v. Grosse*, 155 Cal. 132, 99 P. 499, 501."

The representation that petitioners want the property as a home cannot have any legitimate effect. If equity were to refuse to enforce the rights of respondents solely because petitioners represent they wish to make the property their home, it would be an effective subterfuge and device on the part of the excluded race to make such claim in each instance, and thereafter exercise their right under the fee to

<sup>4</sup> *Mays v. Burgess*, 79 App. D. C. 343, 147 F. (2d) 869, certiorari denied 325 U. S. 868.



do whatever they desire with the property. Certainly the right to enforcement should not be conditioned on anything as uncertain as this, for death, adversity or mere caprice can terminate use as a home.

The Supreme Court of Michigan in the present case, after full consideration of the contentions of petitioners, sustained the enforceable contract rights of respondents.

**(b) Restrictive agreements are compatible with the declared public policy of the State of Michigan; there is no applicable Federal policy.**

Petitioners go so far as to propose that the United Nations Charter prohibits restrictive agreements. While the Charter expresses "a desirable social trend and an objective devoutly to be desired by all well-thinking peoples"<sup>5</sup> it does not affect the subjects of one of the member nations in their private contractual relations; it specifically excludes from its operation matters which are within the domestic, as distinguished from international, jurisdiction of the member nations;<sup>6</sup> and Congress has not enacted any legislation on the subject affecting such private rights.<sup>7</sup>

The Supreme Court of Michigan in its opinion in this case<sup>8</sup> considers carefully the question of whether the indenture is invalid as being against the public policy of the State; the Court concludes it is not. This conclusion is not reviewable<sup>9</sup> and is conclusive as to contracts affecting land in the State of Michigan.

<sup>5</sup> Opinion of Supreme Court of Michigan, Record p. 67.

<sup>6</sup> Charter of the United Nations and Statutes of International Court of Justice, Art. 2, Ch. 1, Par. 7.

<sup>7</sup> *Infra*, p. 16.

<sup>8</sup> Record, pp. 63, 64, 65 and 67.

<sup>9</sup> *Erie Railroad Co. v. Tompkins*, 304 U. S. 64.

**(c) The Fourteenth Amendment of the Constitution of the United States and implementing statutes do not prohibit judicial enforcement of the restriction.**

The most serious and utterly fallacious proposition of petitioners is their contention that a State Court is prohibited from enforcing, by appropriate remedy, the solemn recorded contracts of private individuals in relation to their private property rights. They charge that such judicial action is prohibited by the Fourteenth Amendment of the Federal Constitution and implementing statutes.

They say the Constitution prohibits any State from depriving any person of property without due process of law; they reason that because this Court has held invalid *legislative* acts relating to zoning based on race or color, all contracts between private individuals relating to their private property rights must, *inter alia*, be declared void. While they urge they are denied their property without due process of law, they fail, and possibly refuse, to recognize that the respondents are likewise entitled to the Constitutional guarantees, as individuals, that no State shall deprive *them* of their property without due process of law. Heretofore<sup>10</sup> it has been shown that the right to the enforcement of such restrictive agreements is a valuable property right. Only by completely casting aside fundamental and underlying Constitutional principles protecting all citizens of a State, can petitioners' position be sustained. The rights secured to all citizens must apply to all citizens.<sup>11</sup>

Under our judicial system courts are established to give to all citizens the opportunity to have their private rights, in their dealings one with another, adjudicated by impartial tribunals. While the power of a court is derived from the people through their Constitutions and statutes, State and Federal, and in that sense are representative of governmental authority, it must be clear that never has it been

<sup>10</sup> *Supra*, p. 5.

<sup>11</sup> *Porter v. Johnson*, 232 Mo. App. 1150, 115 S. W. (2d) 529, 533.

seriously questioned that the judiciary is a separate and unique form of governmental function.<sup>12</sup> If this were not so, private citizens could not fearlessly attack legislative and executive action before the courts. The Courts are the guardians of the private rights of all citizens—in their relations with other citizens respecting their personal and property rights and in their relations with government, be it Federal or State. The Courts do not hesitate to hold legislative enactments and administrative activities of the Executive branch to infringe the rights of private citizens; nor do courts hesitate to adjudicate the innocence of persons charged with crime. Yet, it is the Executive branch of government which claims a crime has been committed. If the Courts were government, as urged by petitioners, there could be no trial, for when the Executive says a criminal act has been committed its alter ego—the courts—would function only to commit to jail, performing a mere ministerial function dictated by the Executive. This is obviously not our system; indeed it is a practice which we have strenuously criticized and condemned foreign powers for following. The power of the judiciary as an independent agency, to examine and nullify Acts of Congress, has been recognized since *Marbury v. Madison*, 1 Cr. 137, and this is no less true as to State courts with respect to State laws. The courts are not concerned with political issues, as emphasized in *Georgia v. Stanton*, 6 Wall. 50, where it was sought to restrain the putting into effect of an Act of Congress providing for military government in Georgia:

“For the rights, for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence of a State, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the Court.”

<sup>12</sup> *United States v. Dunnington*, 146 U. S. 338.

But where a State or the Federal Government improperly exercises its governmental functions so as to constitute invasion of private rights, the Courts will take jurisdiction.

*Cohens v. Virginia*, 6 Wheat. 264

*Lane v. Watts*, 234 U. S. 525

Petitioners' thesis is that the State court, exercising its general jurisdiction in equity, has denied petitioners their property rights without due process of law contrary to the Fourteenth Amendment of the Constitution. They say this is true because the court is *government*, and government is prohibited from taking property without due process of law. Their charge is based on this Court's opinion in *Buchanan v. Warley*, 245 U. S. 60. They read into the language that which is not and cannot be there. This Court clearly stated the question to be decided:

"The concrete question here is: May the occupancy, and, necessarily, the purchase and sale of property of which occupancy is an incident, be inhibited by the states, or by one of its municipalities, solely because of the color of the proposed occupant of the premises?"

and the Court's decision held specifically that the attempt of the State by *municipal ordinance* to prevent alienation and use of property to a person solely because of color was not "a legitimate exercise of the police power of the state". Certainly no one seriously will argue that the functions of a court are the "exercise of the police power of the state". The Courts of the land are the only place where citizens may go to be relieved from the improper or oppressive exercise of the police power of the States; if that were not so the Constitutional guarantees would be mere guides to conscience rather than effective to assure protection to all citizens. This Court has said that "the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged *regulation* as a reasonable exertion of



governmental authority or condemn it as arbitrary or discriminatory." (*Nebbia v. New York* (1934), 291 U. S. 502, 536.) It is too fundamental to require more than the mere observation that many acts of the Federal Government and the States, claimed to be discriminatory, do not involve negroes. Petitioners appear to take the position that only negroes are discriminated against; they do not concede that the courts are the only place where law-abiding citizens of any color may obtain equal protection of the laws and save themselves from being deprived of their property without due process of law.

Here, respondents have defined property rights; the petitioners took title to their property subject to the pre-existing rights of respondents. If respondents could not enforce these property rights through the courts of their State certainly they would be denied due process of law; they would be denied the privileges and immunities guaranteed to them under the same Amendment; and they would be denied the application of the fundamental rules of equity.<sup>13</sup>

The California Court in *Burkhardt v. Lofton* (1944) 63 Cal. App. (2d) 230, 146 P. (2d) 720, stated:

"The decree of the trial court in the instant case was not, within constitutional principles, action by the State through its judicial department. Plaintiffs' rights are derived from their contract, the subject matter of which belonged exclusively to the contracting parties \* \* \* if the contract is valid it cannot be nullified under any theory that courts are without power to enforce it."

In discussing the Constitutional guarantees relating to the right of private contract, this Court in *Home Building and Loan Association v. Blaisdell*, 290 U. S. 398, speaking through Mr. Chief Justice, Hughes, stated, beginning at page 429:

"The obligation of a contract is 'the law which binds the parties to perform their agreement.' *Sturges v. Crowninshield*, 4 Wheat. 122, 197, Story, op. cit., Sec.

<sup>13</sup> *Porter v. Johnson*, *supra*.

1378. This Court has said that "the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement . . . *Nothing can be more material to the obligation than the means of enforcement. . . . The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion*.' \* \* \* \* 'It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, *provided no substantial right secured by the contract is thereby impaired*. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of of modifying the remedy, *impair substantial rights*. Every case must be determined upon its own circumstances.' And Chief Justice Waite, quoting this language in *Antoni v. Greenhow*, 107 U. S. 769, added: 'In all cases the question becomes therefore, one of reasonableness, *and of that the legislature is primarily the judge.*'" (Italics supplied)

Where has there been a denial of due process? What due process do petitioners expect to be afforded? They were not required to buy the property when they knew of the pre-existing rights therein of adjacent property owners. But having acquired it with full knowledge of this enforceable right, they were required to conform to that right. Failing in this, respondents did what all law-abiding citizens must do—looked to their Courts for enforcement.

All necessary parties<sup>14</sup> were before the Court and the course of the proceedings as disclosed by the record herein is ample proof that petitioners were not denied due process of law.

"The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which

<sup>14</sup> *Burkhardt v. Lofton*, 63 Cal. App. 230, 146 P. (2d) 720.

*the constitutional protection is invoked. If these are preserved, the demands of due process are fulfilled.*" (Italics supplied)

*Anderson National Bank v. Lockett*, 321 U. S. 233, 246.

See also: *Davidson v. New Orleans*, 96 U. S. 97.

If respondents were barred from securing these rights there is no doubt that they would be deprived of their property without due process of law.

Petitioners' contentions are not new. They were strenuously urged in *Corrigan v. Buckley*, 271 U. S. 323 (1926) and in the Court of Appeals for the District of Columbia (now the United States Court of Appeals for the District of Columbia) notwithstanding the statement of petitioners that the "issue here presented was neither presented or decided there."<sup>15</sup> An examination of the briefs, as well as recollection of the argument, in both Courts indicates clearly that the precise propositions were thoroughly treated. At page 329 of the opinion<sup>16</sup> this Court states that "this appeal was allowed in June, 1924" because defendants claimed the case was one involving the construction and application of the Constitution and certain laws of the United States (Sections 1977, 1978 and 1979 of the Revised Statutes). The opinion states:

"And under well-settled rules jurisdiction is wanting if such questions are so unsubstantial as to be plainly without color of merit and frivolous."

This is not to say the Court did not consider the questions; it *does* mean that this Court after considering the very same contentions now being advanced, found them to be "so unsubstantial as to be plainly without color of merit and frivolous." Respondents submit that this is precisely what petitioners' contentions are—unsubstantial and without merit.

<sup>15</sup> Petitioners' Brief, p. 43:

<sup>16</sup> 271 U. S. 323.

This Court specifically held at page 330 of the opinion:

"The Fifth Amendment 'is a limitation only upon the powers of the general government,' (citing cases) and is not directed against the action of individuals. \* \* \* And the prohibitions of the Fourteenth Amendment 'have reference to state action exclusively, and not to any action of private individuals'. *Virginia v. Rives*, 100 U. S. 313, 318; *United States v. Harris*, 106 U. S. 629. 'It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment.' Civil Rights Cases, 109 U. S. 3, 11. *It is obvious that none of these Amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property; and there is no color whatever for the contention that they rendered the indenture void.*" (Italics supplied)

On the contention of the appellants in the *Corrigan* case that the action of the Court was the action of government and prohibited by the Fifth and Fourteenth Amendments (the precise contention now insisted upon by petitioners), this Court said, by way of recapitulation, at page 331:

"The defendants were given a full hearing in both courts; they were not denied any *constitutional* or *statutory* right; and there is no semblance of ground for any contention that the decrees were so plainly arbitrary and contrary to law as to be acts of mere spoliation. (Citing case) Mere error of a court, if any there be, in a judgment entered after a full hearing, does not constitute a denial of due process of law (citing case)." (Italics supplied)

The injunctive relief granted in *Corrigan v. Buckley* was substantially the same as that granted by the Michigan Court.

Thus this Court, *nine* years after *Buchanan v. Warley*, *supra*, clearly and decisively distinguished between the constitutional validity and enforceability by the courts of individual property rights, and *state action* relating to con-



trol of property because of race or color. The former is sustained, the latter is prohibited.

As previously urged in *Corrigan v. Buckley, supra*, petitioners urge that the judicial enforcement of the covenant violates Section 1978 of the Revised Statutes of the United States (8 U. S. C. Sec. 42). Here again petitioners distort the clear meaning of the language of this Court in *Corrigan v. Buckley, supra*, at page 331:

"Assuming that this contention drew in question the 'construction' of these statutes, as distinguished from their 'application', it is obvious, upon their face, that while they provide, *inter alia*, that all persons and citizens shall have equal right with white citizens to make contracts and acquire property, they, like the constitutional Amendment under whose sanction they were enacted, do not in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property."

Here again is the clear distinction between enforceable private rights and the restraints on governmental power.

With equal clarity the Court of Appeals in *Corrigan v. Buckley*, 55 App. D. C. 30, 299 F. 899, with reference to the applicability of Sections 1977, 1978 and 1979, Revised Statutes, stated at page 32:

"Defendant claims protection under certain legislation of Congress. As suggested in the opinion of the learned trial justice, this legislation was enacted to carry into effect the provisions of the Constitution. The statutes, therefore, can afford no more protection than the Constitution itself. If, therefore, there is no infringement of defendants' rights under the Constitution, there can be none under the statutes."

## **2. Social and Political Problems of a State Must Be Addressed to the Legislature Not the Courts.**

It must be emphasized that such matters as health, housing, crime and the other problems that undoubtedly are acute among Negro citizens, must be addressed to the legis-

lature of the State in the exercise of the police power. Neither this Court nor the courts of the State of Michigan can correct or remedy the conditions complained of. The thirty-six pages of petitioners' brief devoted to these sociological problems would indicate many and varied individuals, organizations and even governmental agencies have devoted much time and effort to the problem. The Supreme Court of Michigan, not unmindful of these problems, although not part of the record in the case, nevertheless declared the indentures to be not against the public policy of that State, and that declaration is conclusive.

### CONCLUSION.

The able opinion of the Supreme Court of Michigan indicates serious consideration was given to every point now urged.

It is respectfully submitted that the judgment herein should be sustained.

HENRY GILLIGAN,

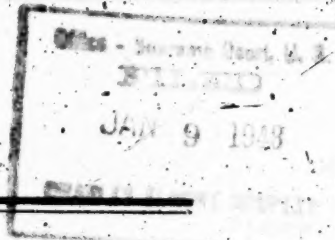
JAMES A. CROOKS,

*Attorneys for Respondents.*

Date: December 1, 1947.

Mr. Lloyd T. Chockley, of Detroit, Michigan, counsel for respondents, died during the pendency of the case in this Court.

FILE COPY



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1947.

No. 87.

ORSEL MCGHEE and MINNIE S. MCGHEE, his wife,  
*Petitioners,*

v.

BENJAMIN J. SIPES and ANNA C. SIPES, JAMES A. COON and  
ADDIE A. COON, ET AL., *Respondents.*

No. 290.

JAMES M. HURD and MARY I. HURD, *Petitioners,*

v.

FREDERIC E. HODGE, ET AL., *Respondents.*

No. 291.

RAPHAEL G. URCILO, ET AL., *Petitioners,*

v.

FREDERIC E. HODGE, ET AL., *Respondents.*

**BRIEF FOR RESPONDENTS IN REPLY TO BRIEF FOR  
UNITED STATES AS AMICUS CURIAE.**

HENRY GILLIGAN,  
JAMES A. CROOKS,  
*Attorneys for Respondents.*

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**PRELIMINARY STATEMENT.**

The United States, through the Attorney General and the Solicitor General, has filed a brief supporting without deviation the contentions of the petitioners in these cases. It asserts that "The Federal Government has a special responsibility for the protection of the fundamental civil rights guaranteed to the people by the Constitution and laws of the United States," but not once in the 123 pages

of its brief does it recognize that the white respondents in these cases are included in that fundamental proposition. Basically, the United States is asserting that the Negro petitioners, and Negroes generally, have rights superior to and beyond white citizens. For this reason, as well as because of certain gross misrepresentations of decisions of this Court, the respondents deem it necessary to file this additional brief.

As indicated in the principal briefs of respondents in these cases, sociological and political arguments, presented at length by petitioners and now by the Government, have no place in the consideration or decision of the questions presented. Nevertheless respondents feel compelled to comment on the lengthy quotations represented to be from letters, copies of which are stated to have been filed in the Clerk's Office, addressed to the Department of Justice by the Administrator, Housing and Home Finance Agency, dated November 4, 1947<sup>1</sup>; by the Surgeon General, dated October 13, 1947<sup>2</sup>; by the Under-Secretary of the Interior, dated November 10, 1947<sup>3</sup>; and by the Legal Adviser to the Secretary of State, dated November 4, 1947<sup>4</sup>. Undoubtedly these letters were solicited by the Department of Justice after it had determined to file a brief in these cases, and respondents call on the Department to file in the Clerk's Office true copies of the letters sent by it to these various agencies in solicitation of the responses quoted from.

However, these letters and the Government's assertions based thereon are not a part of the records herein, are not material, and should not be considered in the decision of these cases.

The Government joins with the petitioners in basing its argument on the unique and false propositions that (1) an individual has a right to purchase or lease a specific parcel

<sup>1</sup> Page 5, Brief for the United States.

<sup>2</sup> Page 13, Brief for the United States.

<sup>3</sup> Page 15, Brief for the United States.

<sup>4</sup> Page 19, Brief for the United States.

of property owned by another; and (2) the enforcement of these private restrictive agreements is "government action" which is prohibited by the Fifth and Fourteenth Amendments of the Constitution. The cases cited and referred to by the Government to support the contention that rights "secured by the Constitution are invaded by the decrees in the courts below" are not in point and do not give support to such contentions.

The principal briefs of respondents in these cases establish (1) the fundamental right of all persons to contract with respect to their private property in the manner now being examined; (2) that restrictive agreements and covenants are not violative of any Constitutional provisions, but rather express the clear right of individuals to control their private property and to obtain the enforcement of those private contract rights by judicial decree.

The purpose here is to point out the inapplicability of the cases relied on and the false conclusions reached by the Government.

### ARGUMENT.

*Hirabayashi v. United States*, 320 U. S. 81, *Korematsu v. United States*, 323 U. S. 214, and other like cases involved a curfew order issued by the Commander of a West Coast Military Area during the war between the United States and Japan, issued pursuant to an executive order of the President under his war powers. These cases did no more than hold that in time of war action taken for reasons of military security, while not excluded from the provisions of the Constitution, nevertheless was not an unconstitutional discrimination against the citizens of Japanese ancestry in violation of the Fifth Amendment, which contains no equal protection clause and restrains only such *discriminatory legislation* by Congress as amounts to a denial of due process; and this Court observed that "legislative classification or discrimination based on race alone has often been held to be a denial of equal protection".<sup>5</sup>

<sup>5</sup> *Hirabayashi v. United States*, *supra*.



Also relied on are cases involving discrimination against Negro members of a craft under the collective bargaining provisions of the Railway Labor Act.<sup>6</sup> This Court examined whether or not the actions of the administrative agency and the union's exclusive right to represent a craft where Negroes were systematically excluded or otherwise denied proper representation, were contrary to the provisions of the Constitution. This Court held<sup>7</sup> that to deny membership and equal right of representation of Negroes in such unions constituted a denial of an *administrative remedy* under the Acts, leaving no mode of enforcement of the minority group's rights under the statutes except by resort to the courts.

The cases relating to selection of jurors and the right of trial of Negroes, stressed by the Government, are addressed to the question "whether, in composition or selection of jurors by whom he is to be indicted or tried, all persons of his race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury." *Strauder v. West Virginia*, 100 U. S. 303. And where discriminatory practices of state officials were involved this Court recognized the ministerial functions of the officials were not in any sense *judicial*.

Equally without application are the numerous cases cited by the Government involving statutes or ordinances which, because of their provisions or application by state officials resulted in unreasonable classifications or discriminations based on race, ancestry or color, were held to be prohibited by the Fourteenth Amendment of the Constitution.<sup>8</sup>

<sup>6</sup> *Steele v. Louisville & Nashville, R. R. Co.*, 323 U. S. 192; *Tunstall v. Brotherhood of Locomotive F. & E.*, 323 U. S. 210.

<sup>7</sup> *Steele v. Louisville & Nashville R. R. Co.*, 323 U. S. 192.

<sup>8</sup> *Truax v. Raich*, 239 U. S. 33; *Yick Wo v. Hopkins*, 118 U. S. 356; *Bush v. Kentucky*, 107 U. S. 110; *Pierre v. Louisiana*, 306 U. S. 354; *Hale v. Kentucky*, 303 U. S. 613; *Neal v. Delaware*, 103 U. S. 370; *Hollins v. Oklahoma*, 295 U. S. 394 (a *per curiam* opinion on the authority of *Neal v. Delaware*, *supra*; and *Norris v. Alabama*, 294 U. S. 587); *Nixon v. Herndon*, 273 U. S. 536; *Smith v. Allwright*, 321 U. S. 649; *Yu Cong Eug v. Trinidad*, 271 U. S. 500, involving a statute of the Philippine legislature.

*Mitchell v. United States*, 313 U. S. 80, and prior cases relating to interstate travel<sup>9</sup> refer to the Federal right to control interstate commerce, through an administrative agency, and hold simply that equal but separate accommodations do not result in unreasonable classifications or denial of equality of treatment.

The Government asserts and apparently casts its criticism of the judicial enforcement of these private contracts on the fact that they are an attempt to control problems of "race hostilities". Nothing in the records of the present cases indicates "hostilities". This is apparently a deliberate attempt on the part of the Government to read into these contracts motives which are not present, even if the motive for a private contract were proper for a court to examine. There is no doubt that legislative action by the Congress or a State must be based upon its power to control the subject matter of the statutes. In *Buchanan v. Warley*, 245 U. S. 60, the ordinance was based on a declared desire to minimize the conflicts between the races and to preserve what the State considered to be the public peace and welfare. Certainly there is no conflict between the statement of this Court that: "desirable as this is, and important as it is for preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution",<sup>10</sup> and the respondents' rights, whatever their motive, to enter into private contracts relating to their property.

The Government asserts that segregation of residential areas, based on race or color of the occupant, results in an unreasonable and arbitrary classification and is a "deprivation without due process of law". And it asserts that it therefore follows that these private contracts are uncon-

<sup>9</sup> *McCabe v. Atchison, T. & S. F. R. Co.*, 235 U. S. 151; *Gaines v. Canada*, 305 U. S. 337.

<sup>10</sup> Page 81, Brief for the United States, quoting from *Buchanan v. Warley*, *supra*.

stitutional because *the municipal ordinance in Buchanan v. Warley, supra*, was, for these reasons, held to be contrary to the Constitution. There can be no logic in such fallacious reasoning.

The Government brief quotes from *Ray v. New York*, 332 U. S. 261.<sup>11</sup> This quotation is lifted out of context and deliberately misrepresents the meaning of the opinion. At pages 282-283 of the opinion this Court states:

"While this case does not involve any question as to exclusion of Negroes or any other race, the defendants rely largely upon a series of decisions in which this Court has set aside state court convictions of Negroes because Negroes were purposefully and completely excluded from the jury. However, because of the long history of unhappy relations between the two races, *Congress has put these cases in a class by themselves*. The Fourteenth Amendment, in addition to due process and equal protection clauses, declares that 'The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article.' So empowered, the Congress on March 1, 1875, enacted that 'no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States or of any State, on account of race, color, or previous condition of servitude'; and made it a crime for any officer to exclude any citizen on those grounds. (March 1, 1875) 18 Stat. 336, 337, c 114, 8 USCA § 44, 2 FCA title 8, § 44. For us the majestic generalities of the Fourteenth Amendment are thus reduced to a concrete statutory command when cases involve race or color, which is wanting in every other case of alleged discrimination. *This statute was a factor so decisive in establishing the Negro case precedents that the Court even hinted that there might be no judicial power to intervene except in matters authorized by Acts of Congress.* (Italics supplied) Referring to the provision empowering Congress to enforce the Fourteenth Amendment, it said that 'All of the amendments derive much of their force from this

<sup>11</sup> Page 69, Brief for the United States. The case involves the validity of so-called "blue-ribbon" juries in criminal cases.

latter provision. It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation.' (Italics in original) Ex parte Virginia, 100 US 339, 345, 25 L ed 676, 679."

Thus it is clear that this Court has reaffirmed Ex parte Virginia, 100 U. S. 339, in recognizing that the judicial power of the Federal Government is not authorized to "declare void any action of a State in violation of the prohibitions" of the Fourteenth Amendment.

Conceding for the moment that Congress may, pursuant to its right to *enforce* the prohibitions of the Fourteenth Amendment by legislation (Section Five), adopt legislation directed to striking down all private restrictive agreements and covenants, similar to its action relating to juries, the fact remains decisively clear *that it has not done so*. There has been no attempt by Congress to legislate the abolition of these private contracts, and in the absence of such legislative action the further observations of this Court in *Fay v. New York, supra*, are appropriate:

"We do not mean that no case of discrimination in jury drawing except those involving race or color can carry such unjust consequences as to amount to a denial of equal protection or due process of law. But we do say that since Congress has considered the specific application of this Amendment to the State jury systems and has found only these discriminations to deserve general legislative condemnation, one who would have the judiciary intervene on grounds not covered by statute must comply with the exacting requirements of proving clearly that in his own case the procedure has gone so far afield that its results are a denial of equal protection or due process."



Petitioners do not contend that the judicial procedure afforded in these cases in the courts below results in denial of equal protection or due process; they, and the Government, contend that the injunctive relief giving effect to the private contracts was "State action".

Section 1978 of the Revised Statutes <sup>12</sup> does no more than afford equal rights, *but no greater rights*, to the Negro who, at the time of the adoption of the Fourteenth Amendment and the enactment of this and companion statutes, had so recently been granted full citizenship. Congress did not then, nor has it since, undertaken to endow the Negro with *greater rights*. Civil Rights Cases, 109 U. S. 3; *Virginia v. Rives*, 100 U. S. 313.

The Government asserts <sup>13</sup> that this Court "is confronted by the existence of such a mass of covenants in different sections of the country as to warrant the assertion that private owners have, by contract, put into effect what amounts to legislation affecting large areas of land—legislation which, if enacted by Congress, by a state legislature, or by a municipal council, would be invalid." This statement, coming from the pen of public servants, is insidious and indefensible. The Government, presumably impartial in its executive functions, has here laid bare its mind; it denominates private contracts relating to private property as *legislation*, because, it says, there are so many of them. Hence, whenever contracts of sale, or leases, mortgages, etc., in use generally, contain uniform language, they are not private contracts or instruments, but legislation. Then it must follow, inversely, that Private Laws enacted by Congress are not statutes, but private contracts. Mere numbers cannot change the character of the instrument, or the rights secured to the parties.

<sup>12</sup> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 8 U. S. C. 42.

<sup>13</sup> Page 79, Brief for the United States.

There is nothing in the records before this Court establishing that these restrictions are the result of a concerted move to exclude Negroes systematically from "large areas of land" or that the restrictions have made "this a Nation of racial patch quilts".<sup>14</sup> Nor does the record disclose any foundation for the statement<sup>15</sup> that such covenants "came into general use as a substitute for invalidated racial restriction legislation." As a matter of fact the restriction involved in Cases Nos. 290 and 291, arising in the District of Columbia, were placed on the property by the developers in 1906, eleven years before *Buchanan v. Warley* (245 U. S. 60). The Government misconceives the real issue involved in these cases, as do the petitioners, and by broad, unfounded statements attempts to divert this Court from the only Constitutional point raised, i.e.: Are the courts prohibited, under the Constitution, from enforcing private contracts relating to private rights in private property?

This Court has recognized the wisdom of limiting its decisions to those matters actually presented by the facts and the issues raised. And the rule applies with equal force whether the matter involves the construction of a statute or relationships not the subject of statute.

"It has no jurisdiction to pronounce any statute, either of the State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered: one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. These rules are safe guides to sound judgment. It is the dictate of wisdom to follow them closely and carefully." *Liverpool, New York and Phila. Steamship Co. v. Commissioners of Emigration*, 113 U. S. 33, 39.

<sup>14</sup> Page 79, Brief for the United States.

<sup>15</sup> Page 83, Brief for the United States.

Again the Government<sup>16</sup> lifts from the context language of this Court in *Block v. Hirsh* (256 U. S. 135) which involved the constitutionality of temporary emergency legislation by Congress regulating rents and tenancies in the District of Columbia during the period immediately following the First World War, and based on a specific legislative declaration of the emergency then existing. This Court specifically noted that the legislation was for a limited period of time (2 years) and "to tide over a passing trouble, may well justify a law that could not be upheld as a permanent change." In 1924, this Court, speaking through Mr. Justice Holmes, in *Chastleton Corp. v. Sinclair*, 264 U. S. 543, declared that statute (The Ball Rent Act) was inoperative because the emergency, which gave rise to the statutory suspension of the private rights of property owners, no longer existed.

Not unlike The Ball Rent Act involved in *Block v. Hirsh, supra*, and *Chastleton Corp. v. Sinclair, supra*, is the Emergency Price Control law which was examined and held constitutional by this Court in *Bowles v. Willingham*, 321 U. S. 503, relating to the control of rents as well as prices during World War II.

At page 80 of the Government's brief an attempt is made to draw into point a series of cases relating to state moratorium laws enacted in many states during the depression years of the 1930s. There is no similarity in the propositions involved in those cases and in the cases now pending. The moratorium laws were held valid under the reserve power of the states to control by legislative determination the economic necessities of the people of the states. Mr. Justice Frankfurter in *East New York Savings Bank v. Hahn* (326 U. S. 230) refers to the key case of *Home Building and Loan Association v. Blaisdell*, 290 U. S. 398, and points out: "Merely to enumerate the elements that have to be considered (relating to the continued need for the New York State Moratorium Law) shows that the place

<sup>16</sup> Page 79, Brief for the United States.

for determining their weight and their significance is the legislature not the judiciary."

In furtherance of the Government's contention that the public interest must deny to the respondents access to the courts to enforce their private contracts, it relies on *Marsh v. Alabama* (326 U. S. 501) and *Martin v. Struthers* (319 U. S. 141). The Marsh Case involved the prosecution under a state statute of a person who sought to distribute religious literature in a town which was company-owned. As pointed out in the concurring opinion of Mr. Justice Frankfurter, "A company-owned town is a town. In its community aspects it does not differ from other towns." The majority opinion casts the decision in the following language:

"The 'business block' serves as the community shopping center and is freely accessible and open to the people in the area and those passing through. The managers appointed by the corporation cannot curtail the *liberty of press and religion* of these people consistently with the purposes of the Constitutional guarantees, and a *State statute*, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature, clearly violates the First and Fourteenth Amendments to the Constitution." (Italics supplied)

Similarly *Martin v. Struthers, supra*, held unconstitutional a city ordinance making it unlawful for any person distributing hand bills, circulars or advertising matter to ring doorbells, or otherwise summon the occupants of any residence. In that case this Court held that such an ordinance was violative of the Fifth and Fourteenth Amendments because it denied the right of freedom of speech and press. Not by any stretch of the imagination can the doctrines enunciated in these cases be considered in point or in any wise related to the question involved in the present cases. This Court in those cases recognized that:

"Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside



reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each household the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas." *Martin v. Struthers*, 319 U. S. 141, 146.

Not even the petitioners in the present cases urge here, nor did they urge below, that they have been denied freedom of speech, press or religion. The attempt to convert these private contracts relating to private property, not sanctioned or restrained by local legislation, into "matter of high public interest"<sup>17</sup> finds no support in any decision of this Court.

Equally without merit is the Government's contention that the test of the validity or enforceability of contracts is contingent on the parties' consideration of "the broader social and economic consequences of their action".<sup>18</sup> The right to contract is guaranteed by the Constitution, carrying with it the undoubted right to enforcement, and has never been dependent upon "social and economic consequences". If the Government's contention were valid, courts could examine into such broad and divergent matters as are incomprehensible before rendering judgment on the right to the enforcement of the ordinary every day contracts of individuals relating to their private property. If one enters into a lease with another for a given amount of rent, and it becomes necessary to sue for the collection of

<sup>17</sup> Government brief, page 82 citing *Nixon v. Condon*, 286 U. S. 73, 88, where it was held that the political parties of the state were "the repositories of official power" of the state under the statute. "They are then the governmental instruments whereby parties are organized and regulated to the end that government itself may be established or continued. What they do in that relation, they must do in submission to the mandates of equality and liberty that bind officials everywhere."

<sup>18</sup> Page 84, Brief for the United States.

that rent, the court, under the Government's theory, would necessarily have to determine whether the rent called for in the lease would bring about grave and possibly disastrous economic results on the community, or possibly whether or not the particular tenant was being cared for properly from a social standpoint. Such utterly ridiculous statements completely discredit the arguments of the Government.

Neither petitioners nor the Government show how and in what manner petitioners are deprived of their property without due process of law. The property was not theirs—the Negro petitioners acted with full knowledge of the existence of the restrictions and in utter disregard of them and the white petitioner,<sup>19</sup> though not compelled to acquire the property or to sell to the excluded class, took with full knowledge of the pre-existing rights of respondents. The Courts below defined the legal consequences of petitioners' acts and declared the applicable principles of real property law. Petitioners were not deprived of *their property*, for they had no property. Lack of jurisdiction of the Courts below is not claimed; lack of proper parties or failure of full hearing is not charged. Petitioners and the Government say only that the Courts below did not decide the cases the way they urged. Certainly this does not constitute a lack of due process.

*Kryger v. Wilson*, 242 U. S. 171.

*Anderson Nat. Bank v. Luckett*, 321 U. S. 233, 246.

### CONCLUSION.

Neither the records in the present cases, nor the decisions of this Court or any State court, justify the pernicious statements in the Government's brief, particularly set out in their conclusions beginning at page 121. The Government presumably serves all citizens, yet it charges these respondents and others with ignorance, bigotry and prejudice. It is understandable that private litigants may make

<sup>19</sup> Cases Nos. 290, 291.

statements of this kind, in their effort earnestly to press their cases, but the Government must not only be criticized, but condemned, for such practice.

Respondents submit that the Government, as well as petitioners, base their case on a false premise, not founded on the Constitution, statutes or judicial decisions. Due process of law and equal protection have been afforded petitioners; they are entitled to no more. And respondents likewise are entitled to, and here contend that the decrees below have afforded, due process and equal protection. Respondents do not claim to be superior to, or entitled to greater rights than petitioners. They do say that they would be denied these Constitutional guarantees if they were denied the right to contract in relation to their private property and to enforce such contracts in an orderly manner under well established substantive and procedural principles.

It is respectfully submitted that for the reasons set out herein and in the separate principal briefs of the respondents in these cases the decisions of the Courts below should be affirmed.

Respectfully submitted,

HENRY GILLIGAN,  
JAMES A. CROOKS,  
*Attorneys for Respondents.*





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# Supreme Court of the United States

OCTOBER TERM, 1947

No. 87

ORSEL MCGHEE and MINNIE S. MCGHEE, his wife,  
*Petitioners,*

*vs.*

BENJAMIN J. SIPES and ANNA C. SIPES, JAMES A. COON  
and ADDIE A. COON, *et al.,*

*Respondents.*

BRIEF FOR PETITIONERS AS AMICUS CURIAE

JULIUS L. GOLDSTEIN,

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Human Rights, Inc., as Amicus Curiae.*



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**Supreme Court of the United States**  
**OCTOBER TERM, 1947**

**No. 87**

ORSEL MCGHEE and MINNIE S. MCGHEE,  
his wife, Petitioners,

*vs.*

BENJAMIN J. SIPES and ANNA C. SIPES,  
JAMES A. COON and ADDIE A. COON,  
et al.

**BRIEF FOR PETITIONERS AS AMICUS CURIAE**

**I**

**Statement**

Pursuant to Rule 27 of the General Rules of this Court, this brief is presented *amicus curiae*; certiorari in this case having been granted by this Court on June 23, 1947 (91 Lawyers' Ed. 1606):

Amicus, the Non-Sectarian Anti-Nazi League to Champion Human Rights, Inc. is an organization which operates throughout the United States to combat racial and religious discrimination and oppression.

For about fifteen years, the League has continuously maintained economic and legal research departments through which it has, among other things, developed the information with which it has applied to the courts and other agencies of our government to secure for our citizenry equality of treatment before the law, irrespective of race, color or creed.

The President's Committee on Civil Rights has made specific recommendations (New York Times, October 30, 1947, p. 14, et. seq.) for the execution of a program of action, containing the following important observations:

### THE TIME IS NOW

Twice before in American history the nation has found it necessary to review the state of its civil rights. The first time was during the fifteen years between 1776 and 1791, from the drafting of the Declaration of Independence through the Articles of Confederation experiment to the writing of the Constitution and the Bill of Rights. It was then that the distinctively American heritage was finally distilled from earlier views of liberty. The second time was when the Union was temporarily sundered over the question of whether it could exist "half-slave" and "half-free."

It is our profound conviction that we have come to a time for a third re-examination of the situation, and a sustained drive ahead. Our reasons for believing this are those of conscience, of self-interest, and of survival in a threatening world. Or to put it another way, we have a moral reason, an economic reason, and an international reason for believing that the time for action is now.

### THE INTERNATIONAL REASON

Our position in the postwar world is so vital to the future that our smallest actions have far-reaching effects. We have come to know that our own security in a highly interdependent world is inextricably tied to the security and well-being of all people and all countries. Our foreign policy is designed to make the United States an enormous, positive influence for peace and progress throughout the world. We have tried to let nothing, not even extreme political differences between ourselves and foreign nations, stand in the way of this goal. But our domestic civil rights shortcomings are a serious obstacle.

In a letter to the Fair Employment Practice Committee on May 8, 1946, the Honorable Dean Acheson, then Acting Secretary of State, stated that:

... the existence of discrimination against minority groups in this country has an adverse effect upon our relations with other countries. We are reminded over and over by some foreign newspapers and spokesmen, that our treatment of various minorities leaves much to be desired. While sometimes these pronouncements are exaggerated and unjustified, they all too frequently point with accuracy to some form of discrimination because of race, creed, color or national origin. Frequently we find it next to impossible to formulate a satisfactory answer to our critics in other countries; the gap between the things we stand for in principle and the facts of a particular situation may be too wide to be bridged. An atmosphere of suspicion and resentment in a country over the way of minority is being treated in the United States is a formidable obstacle to the development of mutual understanding and trust between the two countries. We will have better international relations when these reasons for suspicion and resentment have been removed.

I think it is quite obvious ... that the existence of discriminations against minority groups in the United States is a handicap in our relations with other countries. The Department of State, therefore, has good reason to hope for the continued and increased effectiveness of public and private efforts to do away with these discrimination.

The people of the United States stem from many lands. Other nations and their citizens are naturally intrigued by what has happened to their American "relatives." Discrimination against, or mistreatment of, any racial, religious or national group in the United States is not only seen as our internal problem. The dignity of a country, a continent, or even a major portion of the world's population, may be outraged by it. A relatively few individuals here may be identified with millions of people elsewhere, and the way in which they are treated may have world-wide repercussions. We have fewer than half a million American Indians; there are 30 million



more in the Western Hemisphere. Our Mexican American and Hispano groups are not large; millions in Central and South America consider them kin. We number our citizens of Oriental descent in the hundreds of thousands; their counterparts overseas are numbered in hundreds of millions. Throughout the Pacific, Latin America, Africa, the Near, Middle, and Far East, the treatment which our Negroes receive is taken as a reflection of our attitudes toward all dark-skinned peoples.

In the recent war, citizens of a dozen European nations were happy to meet Smiths, Cartiers, O'Haras, Schultzes, di Salvos, Cohens, and Sklodowskas and all the others in our armies. Each nation could share in our victories because its "sons" had helped win them. How much of this good feeling was dissipated when they found virulent prejudice among some of our troops is impossible to say.

We cannot escape the fact that our civil rights record has been an issue in world politics. The world's press and radio are full of it. This Committee has seen a multitude of samples. We and our friends have been, and are, stressing our achievements. Those with competing philosophies have stressed—and are shamelessly distorting—our shortcomings. They have not only tried to create hostility toward us among specific nations, races, and religious groups. They have tried to prove our democracy an empty fraud, and our nation a consistent oppressor of underprivileged people. This may seem ludicrous to Americans, but it is sufficiently important to worry our friends. The following United Press dispatch from London proves that (*Washington Post*, May 25, 1947):

Although the Foreign Office reserved comment on recent lynch activities in the Carolinas, British diplomatic circles said privately today that they have played into the hands of Communist propagandists in Europe . . .

Diplomatic circles said the two incidents of mob violence would provide excellent propaganda ammunition for Communist agents who have been decrying America's brand of "freedom" and "democracy."

News of the North Carolina kidnaping was prominently displayed by London papers . . .

The international reason for acting to secure our civil rights now is not to win the approval of our totalitarian critics. We would not expect it if our record were spotless; to them our civil rights record is only a convenient weapon with which to attack us. Certainly we would like to deprive them of that weapon. But we are more concerned with the good opinion of the peoples of the world. Our achievements in building and maintaining a state dedicated to the fundamentals of freedom have already served as a guide for those seeking the best road from chaos to liberty and prosperity. But it is not indelibly written that democracy will encompass the world. We are convinced that our way of life—the free way of life—holds a promise of hope for all people. We have what is perhaps the greatest responsibility ever placed upon a people to keep this promise alive. Only still greater achievements will do it.

*The United States is not so strong, the final triumph of the democratic ideal is not so inevitable that we can ignore what the world thinks of us or our record."*

## ARGUMENT AND POINT

**The judicial enforcement of the restrictive covenant violates the treaty obligations of the United States (R. 71).**

The Fourteenth Amendment to the Federal Constitution, Sec. 1, reads:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall *make or enforce* any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State *deprive* any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

In 1945 the Ontario High Court gave judicial life to the anti-discrimination provisions of the San Francisco Charter,

the Atlantic Charter, the Act of Chapultepec, and the Charter of the United Nations, in holding, *In Re Drummond Wren*, 4 D. L. R. 674, that a restriction against the use of land by members of racial minorities is contrary to the public policy of Canada because that country has dedicated itself, by adherence to the stated international treaties, to promote respect for and observe human rights and fundamental freedoms.

Taking into account the treaties and the public utterances of statesmen, the court held that such restrictions were void, and said:

"How far this is obnoxious to public policy can only be ascertained by projecting the coverage of the covenant with respect both to the classes of persons whom it may adversely affect, and to the lots or subdivisions of land to which it may be attached. So considered, the consequences of judicial approbation of such a covenant are portentous. If sale of a piece of land can be prohibited to Jews, it can equally be prohibited to Protestants, Catholics or other groups or denominations. If the sale of one piece of land can be so prohibited, the sale of other pieces of land can likewise be prohibited. In my opinion, nothing could be more calculated to create or deepen divisions between existing religious and ethnic groups in this province, or in this country, than the sanction of a method of land transfer which would permit the segregation and confinement of particular groups to particular business or residential areas, or conversely, would exclude particular groups from particular business or residential areas. The unlikelihood of such a policy as a legislative measure is evident from the contrary intention of the recently-enacted Racial Discrimination Act, and the judicial branch of government must take full cognizance of such factors:

"Ontario, and Canada too, may well be termed a province, and a country, of minorities in regard to the religious and ethnic groups which live therein. It appears to me to be a moral duty, at least, to lend aid to all forces of cohesion, and similarly to repel all fissiparous tendencies which would imperil national unity. The common law courts have by their

actions over the years, obviated the need for rigid constitutional guarantees in our policy by their wise use of the doctrine of public policy as an active agent in the promotion of the public weal. While courts and eminent judges have, in view of the powers of our legislatures, warned against inventing new heads of public policy, I do not conceive that I would be breaking new ground were I to hold the restrictive covenant impugned in this proceeding to be void as against public policy. Rather would I be applying well-recognized principles of public policy to a set of facts requiring their invocation in the interest of the public good.

"That the restrictive covenant in this case is directed in the first place against Jews lends poignancy to the matter when one considers that anti-semitism has been a weapon in the hands of our recently-defeated enemies, and the scourge of the world. But this feature of the case does not require innovation in legal principle to strike down the covenant; it merely makes it more appropriate to apply existing principles. If the common law of treason encompasses the stirring up of hatred between different classes of His Majesty's subjects, the common law of public policy is surely adequate to void the restrictive covenant which is here attacked.

"My conclusion therefore is that the covenant is void because offensive to the public policy of this jurisdiction. This conclusion is reinforced, if reinforcement is necessary, by the wide official acceptance of international policies and declarations frowning on the type of discrimination which the covenant would seem to perpetuate."

The demonstrable consequences of such restrictions will be fully developed in the briefs of the parties. But it is useful to explore very briefly how our courts have in the past viewed such obligations, only for the purpose of evaluating the problem against the obligations we assume as charter members of the United Nations.

A controversy has raged over whether *Corrigan v. Buckley*, 1926, 271 U. S. 323, is controlling in support of



such restrictions and some have persuasively argued that the dictum in the *Corrigan* case is not a precedent upholding the enforcement of restrictive covenants; that such an issue was never fully decided by the Supreme Court. (Cf. Dissenting Op. by Mr. Justice Edgerton, in *Hurd v. Hodge*, No. 9196, U. S. Ct. of Appeals, Dist. of Columbia, May 26, 1947, cert. granted, 92 L. ed. 34).

In *Buchanan v. Warley*, 245 U. S. 60, this court was asked to evaluate a city ordinance, in the State of Kentucky, which forbade any white or Negro person from moving into a block in which one or the other race already occupied a majority of the dwellings. Notwithstanding the seeming reciprocity of this legislation, this court struck it down as an unconstitutional qualification of the right to acquire or occupy property, on the basis of color.

It is clear from the briefs of the parties that both legislative action and legislative sanction of private action are unconstitutional and void, as irreconcilable with the 14th Amendment. (Cf. *Harmon v. Tyler*, 273 U. S. 668; *Richmond v. Deans*, 281 U. S. 704.)

Restriction has, however, been sustained on the theory that it is the result of private covenant. This device seems doomed to exposure and annihilation because the distinction between legislative action and judicial enforcement of private agreements, as a variant from state action, is untenable, for it is a variant of and not from state action.

Judicial enforcement of any agreement carries with it the sanction of the state. Reversing the highest court in the state of Missouri, this Court held in *Brinkerhoff-Faris Co. v. Hill*, 281 U. S. 673, that the " . . . federal guarantee of due process extends to state action through the judicial as well as through the legislative, executive or administrative branch of government."

See also: *Raymond v. Chicago Traction Co.*, 207 U. S. 20, 36.

"Judicial acts" within the meaning of the cases comprehends procedural as well as substantive remedies. (Cf.

*Powell v. Alabama*, 287 U. S. 45 (procedural rights), *Brinkerhoff-Faris Co. v. Hill*, *supra*, *Ex parte Virginia*, 100 U. S. 339 (substantive rights). "State action" also means the same thing for the due process clause of the Fifth Amendment as it does for the Fourteenth Amendment.

"Validity of Anti-Negro Restrictive Covenants; a Reconsideration of the Problem", (Kahen, 12 U. of C. L. R. p. 198, 1945); "Racial Residential Segregation by State-Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional", (Prof. McGovney, 33 Cal. L. R. 5, 1945).

With this cursory glance at some of the authorities, we return to the question whether such covenants are to be denied enforcement by virtue of existing treaties to which the United States is a signatory.

Since *Corrigan v. Buckley*, *supra*, the United States of America has made two international treaties in which she pledged herself to abolish discrimination.

Article 6, clause 2 of the Constitution of the United States declares: "The Constitution and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land and the Judges in every state shall be bound thereby any Thing in the Constitution or Laws of any state to the contrary notwithstanding".

Thus, the Constitution provides that a treaty between the United States and another nation takes precedence over private covenants in conflict with treaty obligations. The policy of the United States, exemplified in its treaties, is by universally acknowledged principles of law, obligatory on every citizen of the United States. (*Kennett . Chambers*, 14 How. 38.)

"International law is part of our law and must be ascertained and administered by the courts of justice

\*\*\* as often as questions of right depending upon it are duly presented for their determination" (*Hilton v. Guyot*, 159 U. S. 113, 163).

In international law a treaty is defined as an agreement between two or more independent states, or as a league or contract between two or more sovereigns firmly signed by commissions properly authorized and solemnly ratified by the several sovereigns or the supreme power of each state. (*Webster*:—*Cherokee Nation v. Georgia*, 5 Pet. 60, 8 Lawyers' Ed. 25; *Edye v. Robertson*, 112 U. S. 580, 28 Lawyers' Ed. 798; *Holmes v. Jennison*, 14 Pet. 571, 10 Lawyers' Ed. 579; *U. S. v. Rauscher*, 119 U. S. 407, 30 Lawyers' Ed. 425; *ex parte Ortiz* (C. C.) 100 Fed. 962; *Charlton v. Kelly*, 57 Lawyers' Ed. 1274, 46 L. R. A. New Series 397).

"The courts of the United States lost no time in affirming the principle that international law is part of the law of the land. Before the end of the century, the last quarter of which saw the establishment of American independence and the adoption of the Constitution, Mr. Justice Wilson laid down the principle that 'when the United States declared their independence, they were bound to receive the law of nations in its modern state of purity and refinement.' (*Ware vs. Hylton*, 3 Dallas, 199, 1 L. Ed., 568.) This was followed by a declaration of Chief Justice Marshall, in 1804, that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. (*The Charming Betsy*, 2 Cranch, 64, 2 L. Ed., 208.) Later, in 1815, the Chief Justice reaffirmed this position and held that until an act of Congress has been passed "the court is bound by the law of nations, which is a part of the law of the land." (*The Nereide*, 9 Cranch, 388, 3 L. Ed., 769.)

"The position proclaimed so early in the history of the Supreme Court this tribunal has consistently maintained. Indeed, in some instances it has chosen to adopt language even stronger than that of John Marshall. Thus in 1895, speaking for the court, Mr. Justice Gray holds that interna-

tional law, in its widest and most comprehensive sense, is a part of the law of the land, and must be ascertained and administered by the courts of justice as often as questions involving international law are presented in litigation between man and man and duly submitted for the decision of the courts. The justice emphasizes that he has in mind not only questions of right between nations when he speaks of international law, but questions of what international jurists call private international law, or the conflict of laws, as it is otherwise frequently called, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominion of another nation. (*Hilton vs. Guyot*, 159 U. S., 677, 40 L. Ed., 95.) In a still later case, and one which has become a leading decision in the latter-day history of international law, it is again Mr. Justice Gray who holds that 'international law is a part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.' (*The Paquette Habana*, 175 U. S., 677, 44 L. Ed., 320; *The Lusi-tania*, 251 Fed. Rep., 715.) In administering this law the court does not consider itself 'at liberty to inquire what is for the particular advantage or disadvantage of our own or another country.' (*The Peterhoff*, 5 Wallace, 28, 18 L. Ed., 564.)

Enforcement of international law by the courts, whenever proper and possible, undoubtedly makes for progress in orderly international relations, but, from the point of view of the practicing lawyer, it has also the important and practical result that the law of nations, unlike foreign municipal law, does not have to be proved as a fact and is taken judicial notice of by the courts. (*The Scotia*, 14 Wallace, 170, 20 L. Ed., 822; *The New York*, 175 U. S., 187, 44 L. Ed., 126.)—('Judicial Interpretation of International Law in the United States'—Pergler—pp. 8, 9, 10.)

See also *United States vs. Thompson*, 257 U. S., 432, 66 L. Ed., 299. Mr. Justice Holmes declares in this opinion



that "there is no mystic over law to which even the United States must bow. When a case is said to be governed by foreign law or by general maritime law, that is only a short way of saying that, for this purpose, the sovereign power takes up a rule suggested from without, and makes it part of its own rules."—"Judicial Interpretation of International Law in the United States"—Pergler—p. 16.)

On March 6, 1945 the United States, acting through its commissioners, formally signed a treaty (later solemnly ratified by the United States Senate), with the Latin-American nations, known as the Act of Chapultepec, which provided, among other things, that the signatories would " . . . *prevent with all the means within their power all that may provoke discrimination among individuals because of racial and religious reasons*". (Emphasis supplied).

Article 55, subd. c. of the Charter of the United Nations, dealing with international economic and social cooperation, provides that "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples the United Nations shall promote: . . .

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion".

The objections under "c." were taken over from the Dumbarton Oaks proposals with two changes. One was the addition of the words "for all without distinction as to race, sex, language or religion", which had the effect of defining more explicitly the application of the principle. The other change consisted of the inclusion of the words "and observance of", by which it was obviously intended to translate the principle into practice by requiring its actual observance.

Article 56 of the Charter of the United Nations specifically implements the declaration of principles found in article 55 in these words: "All members pledge themselves

to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in article 55."

In discussing these sections, Leland M. Goodrich and Edvard Hambro (Charter of the United Nations, Commentary and Documents) say in part as follows, (p. 189, et seq.):

"The Dumbarton Oaks proposals contained no such pledge. Apparently it was to be assumed that the commitment of the organization contained in the statement of purposes was enough. Some of the governments represented at San Francisco felt, however, that a more specific commitment was necessary to reinforce the statement of purposes and to make it clear that the members obligated themselves to take individually the action necessary to make the cooperation effective. (The history of this section is important for it discloses an intent on the part of each signatory to be bound by the commitment). The original text proposed by the drafting subcommittee of Committee II/3 read as follows: "All members pledge themselves to take separate and joint action and to cooperate with the organization and with each other to achieve these purposes". (Summary report of 12th meeting of Committee II/3, May 26, 1945, doc. 599, II/3/31, p. 1). (Matter in parenthesis, supplied).

"The United States delegate reserved her position on the question of phraseology, and the matter was referred back to the subcommittee for reconsideration. The subcommittee then recommended the following phraseology: "All members undertake to cooperate jointly and severally with the organization for the achievement of these purposes". (Summary report of the 14th meeting of Committee II/3, May 29, 1945, doc. 684, II/3/38, p. 4): "Several delegates still objected to this phraseology on the ground that it did not contain the three-fold pledge which the Committee had in principle approved, i.e., the pledge to take separate action, to take joint action, and to cooperate with

the organization." (Summary report of the 15th meeting Committee II/3, May 30, 1945, doc. 699, II/3/40, p. 123, inc.) "It was voted to refer the matter back a second time to the drafting subcommittee. The phraseology which the subcommittee recommended the third time was found acceptable." (Summary report of 17th meeting of Committee II/3, June 1, 1945, doc. 747, II/3/46, p. 1).

"From this abbreviated account of the history of the article, it is clear that two opposing points of view were proposed at San Francisco. One was that each member should pledge himself to take independent, separate national action to achieve the purposes set forth in article 55. This was the view of the Australian Delegation, for example, and found expression in a proposed amendment, which perhaps was the original inspiration of this Article.

"On the other hand, there was the view that such a pledge of separate national action went beyond the proper scope of the Charter, which was concerned with encouraging international cooperation and perhaps even infringed upon the domestic jurisdiction of Member States. This apparently was the view of the American Delegation.

"The phraseology officially agreed to was a compromise, and like most compromises, was capable of more than one interpretation..."

However, this much is clear: The members pledged themselves to take separate action to achieve the purposes of Article 55, and although this separate action was presumably to be taken in cooperation with the organization for the achievement of the purposes set forth in article 55, it had to include domestic action to assume any significance whatever.

Legally speaking, therefore, this seems to be the right time to find out if the United Nations means anything. If it means anything, the Supreme Court now has a rare opportunity to translate into action the meaning of the provisions of the Charter which the member nations pledged

themselves to carry out. It is quite easy to talk of democracy and of our devotion to its principles, particularly when we happen to be looking for benefits for ourselves, but this is not enough. We talk of equal justice under law, but this is not enough because talk is not enough. We talk of rights conferred by the United Nations Charter, but this is not enough, unless the rights are translated into reality. Segregation is not democracy and the parochial sovereignty of a segregation-minded property owner is not democracy. Lincoln once said: "As I would not be a slave, so I would not be a master. This expresses my idea of democracy. Whatever differs from this to the extent of the difference is no democracy". So say the United Nations and they are up to date.

A movement called "Common Cause" recently pointed out that "Democracy means equality... recognizes no races, castes or orders commissioned by God or qualified by their own attributes to exploit, govern or enslave their fellow human beings.

"Democracy means rule of law: ... all individuals and minorities should be protected in their rights and liberties against the passion of mobs, the vengeance of party, the power of privilege, the tyranny of policy, the caprice of officials, the ambitions of madmen and the arbitrary invasions of government."

Respectfully Submitted,

JULIUS L. GOLDSTEIN,  
*Counsel for Non-Sectarian Anti-Nazi League  
 to Champion Human Rights, Inc., as Amicus  
 Curiae.*



FILE COPY  
IN THE  
Supreme Court of the United States

OCTOBER TERM, 1947.  
No. 87.

ORSEL MCGHEE and MINNIE S. MCGHEE, his wife,  
*Petitioners,*

*vs.*

BENJAMIN J. SIPES, and ANNA C. SIPES, JAMES A.  
COON and ADDIE A. COON, *et al.,*  
*Respondents.*

BRIEF OF CALIFORNIA AMICI CURIAE.

ISAAC PACT,  
IRVING HILL,  
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DOUGLAS BADT.



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IN THE  
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OCTOBER TERM, 1947.

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*Petitioners,*

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BENJAMIN J. SIPES, and ANNA C. SIPES, JAMES A.  
COON and ADDIE A. COON, *et al.,*  
*Respondents.*

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**BRIEF OF CALIFORNIA AMICI CURIAE.**

---

**Preliminary Statement.**

*Amici curiae* represent a client in pending litigation who has an interest in the decision and judgment of this court upon the issues presented by this case.<sup>1</sup> Consent of counsel for petitioners and respondent has been obtained, and permission is respectfully requested for leave to file this brief, and to have the same considered in this and companion cases before the court.

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<sup>1</sup>*Tolhurst v. Venerable and Crawford*, Supreme Ct. of Calif., L. A. No. 19759, pending and submitted before the Supreme Court of California, on appeal from judgment for defendants by the Superior Court of Los Angeles County.

This brief will be limited to presenting certain legal aspects of the problem resulting from the prevalent use of private covenants restricting the use and occupancy of real property to persons of the white race. The law questions involved will be fully and adequately presented by the briefs of petitioners and other interested parties. There will be considered herein only the following:

1. The amount of litigation involved in the enforcement of racial restrictive covenants in the County of Los Angeles.
2. Cases now pending in the Supreme Court of the State of California.
3. Character of the proscriptions.
4. Current trends.
5. Recent judicial expression at the trial court level.

#### **Amount of Litigation.**

In excess of 70 individual actions involving over 160 parcels of land have been filed in Los Angeles County since 1943. The great majority of the actions involve Negroes. In view of the judicial attitude in regards to the enforcement of racial restrictive covenants<sup>2</sup> this vast amount of litigation is indicative of the tremendous pressures incident to the problems of housing for members of the Negro race in Los Angeles County.

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<sup>2</sup>*Swift v. Rogers*, Los Angeles Superior Ct. No. 500075, wherein the trial court stated: "However, desirable the defendants may be in the cultural life of the immediate community and as neighbors we must apply the law as it exists. Restrictions as to use or occupancy will be enforced in a court of equity."

## Cases Pending Before the Supreme Court of California

There are now pending before the Supreme Court of California 22 cases directly involving the constitutionality of racial restrictive covenants.<sup>3</sup>

<sup>3</sup>*In re Laws*, Crim. No. 4698, Petition for Writ of Habeas Corpus filed Dec. 18, 1945. Argued June 13, 1946.

*Fairchild v. Raines*, Supreme Ct. of Calif., L. A. No. 19523. Transcript filed Oct. 15, 1945. Set for argument June 13, 1946, argument waived.

*Anderson v. Auseth*; *Smith v. Crawford*; *Maricq v. Pickett*; *Daniels v. Johnson*; *Tolhurs v. Venerable*; *White v. Smith*; *Weber v. Twyne, Sr.*; *McComas v. Lott* (consolidated), Supreme Court of Calif., L. A. No. 19759. Transcript filed June 6, 1946. Argued Oct. 2, 1946.

*Trautman v. O'Ferral*; *Hester v. Barbe*; *Hester v. Thompson*; *Hester v. Morrison*; *McCormick v. Howard*; *Bushelman v. Cooper*; *McCormick v. McCray*; Supreme Ct. of Calif., L. A. Nos. 19588, 89, 90, 91, 92, 93 and 94, numbered respectively and consecutively. Transcript filed Dec. 20, 1945. Argued June 13, 1946.

*Cassell v. Hickerson*, Supreme Ct. of Calif., L. A. No. 19685. Transcript filed Mar. 22, 1946. Set for argument June 13, 1946. Argument waived.

*Davis v. Carter*, Supreme Ct. of Calif., L. A. No. 19696; *Davis v. Williams*, Supreme Ct. of Calif., L. A. No. 19699. Transcript filed Dist. Ct. of Appeal of Calif., Apr. 2, 1946. Transferred to Supreme Ct. of Calif., April 15, 1946. Set for argument June 13, 1946. Argument waived.

*Sandel v. Williams*, Supreme Ct. of Calif., L. A. No. 19783. Transcript filed July 1, 1946. Set for argument Oct. 2, 1946.

*Merriveather v. Flemming*; *Merriveather v. Looper* (consolidated), Supreme Ct. of Calif., L. A. No. 19916. Transcript filed Oct. 2, 1946.

*Clayton v. Wilkins*, Supreme Ct. of Calif., L. A. No. 20399. Transcript filed Oct. 28, 1947.



### Character of the Proscriptions.

The restrictions are not limited to the Negro alone, although they are the chief victims. Restrictions against American Indians,<sup>4</sup> Japanese,<sup>5</sup> Chinese,<sup>6</sup> Koreans,<sup>7</sup> have been upheld. The restrictions are not limited to the lower economic brackets, but cover all sections of the minority groups from slum areas<sup>8</sup> through property of the middle income,<sup>9</sup> and including the high income groups,<sup>10</sup> in the Negro community.

<sup>4</sup>*Swift v. Rogers*, Los Angeles Superior Ct. No. 500075. See Note 2, *supra*.

<sup>5</sup>*Bousek v. Kim*, Los Angeles Superior Ct. No. 521066; *Tracey v. Natsura*, Los Angeles Superior Ct. No. 527327; *Bennett v. Rozier*, Los Angeles Superior Ct. No. 528911 (involving 17 parcels of land); *Morin v. Crane*, Los Angeles Superior Ct. No. 529939 (involving 6 parcels of land).

<sup>6</sup>*Amer v. Superior Court of L. A. County*, Los Angeles Superior Ct. No. 512074 (*Kroeger v. Kong*). Petition for Writ of Prohibition to Supreme Court of Calif. denied Aug. 21, 1947, L. A. No. 20303. Petition for Writ of Certiorari filed in Supreme Court of U. S. Nov. 6, 1947, No. 429.

<sup>7</sup>*Kim v. Superior Court of L. A. County*, Los Angeles Superior Court No. 521066 (*Bousek v. Kim*). Petition for Writ of Prohibition to Supreme Court of Calif. denied Aug. 21, 1947, L. A. No. 20302. Petition for Writ of Certiorari filed in Supreme Court of U. S. Nov. 6, 1947, No. 430.

<sup>8</sup>*Thompson v. Clark*, District Court of Appeal of Calif., L. A. No. 15215.

<sup>9</sup>*Trautman v. O'Ferral*; *Hester v. Barbe*; *Hester v. Thompson*; *Hester v. Morrison*; *McCormick v. Howard*; *Bushelman v. Cooper*; *McCormick v. McCray*; Supreme Ct. of Calif., L. A. Nos. 19588, 89, 90, 91, 92, 93 and 94, numbered respectively and consecutively.

<sup>10</sup>*Tolhurst v. Venerable and Crawford*, and consolidated cases, Supreme Ct. of Calif., L. A. No. 19759.

### Current Trends.

In an effort to restrict Negroes, Orientals and Mexicans to the few areas now occupied by them in Los Angeles County, restrictive covenant activities have increased greatly in the neighborhoods immediately surrounding those areas. Previously, this circulation of contracts containing these restrictive covenants was conducted by Property Owners' Associations and Realty Boards. The work was largely volunteer and covered only small areas at a time.

Scope and determination of the current campaign, however, is indicated by the new use of commercial enterprises specializing in this work. A meeting of the Presidents and Secretaries Council of the San Fernando (Los Angeles County) Valley Chambers of Commerce<sup>11</sup> has resulted in the October appearance of a public relations firm engaged in the business of "promoting" segregation, using a technique of blanketing large areas with a single expandable agreement. Property owners and realty boards are gradually privately zoning residential property in Southern California. All such activities are premised upon reliance on prospective court enforcement of these restrictive covenants and agreements. The restrictions are not limited to individual action but take on a public or quasi-public character. The City of Pasadena has inserted a race restrictive covenant in the sale of tax deeded land. The constitutionality of said action is now being tested in the trial court.<sup>12</sup>

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<sup>11</sup>*Valley Advertiser*, published by the Hollywood Citizen-News on May 22, 1947, page 1.

<sup>12</sup>*Chamberlain v. City of Pasadena* (Los Angeles County), Pasadena Superior Ct. No. C-2702.

### Recent Judicial Expression.

In earlier cases involving enforcement of the racial covenant restrictions, and in some current cases, the trial courts felt constrained to follow literally the holding of the California Supreme Court in the *L. A. Investment Co. v. Gary* case.<sup>13</sup> This is one of the first cases in the United States which laid the pattern for enforcement of private racial covenant restrictions. In some instances, however, restrictions were not enforced because of equitable considerations.<sup>14</sup> In other cases the rule of the *L. A. Investment Co.* case holding the covenants to be not violative of the Federal Constitution has been followed. Within the recent past, however, there has been a change of view on the part of certain trial judges who have refused to enforce the restrictions on the grounds that they were unconstitutional. Their opinions are suggested to the Court, not as authoritative except as they reflect a considered moral, ethical and—what we respectfully believe to be—a sound legal position.

Los Angeles Superior Court Judge Thurmond Clarke in barring the introduction of any evidence and dismissing a complaint to enforce racial restrictions, on December 6, 1945, stated:

"This Court is of the opinion that it is time members of the Negro race are accorded, without reservation and evasion, the full rights guaranteed them un-

<sup>13</sup>181 Cal. 680, 186 Pac. 596, 9 A. L. R. 115 (1919).

<sup>14</sup>*Fairchild v. Raines*, 24 Cal. (2d) 818, 151 Pac. (2d) 260 (1944).

der the Fourteenth Amendment to the Federal Constitution. Judges have been avoiding the real issue for too long. Certainly there is no discrimination against the Negro race when it came to calling upon its members to die on the battlefields in defense of this country in the War just ended. The objections of the defendant to the introduction of testimony will be sustained. I think that disposes of the matter at this particular time.<sup>15</sup>

Los Angeles Superior Court Judge Stanley Mosk, in a more recent case, in dismissing a complaint, delivered the following remarks from the bench on the 23rd day of October, 1947:

"There is no allegation and no suggestion that any of these defendants would not be law-abiding neighbors and citizens of the community. The only objection to them is their color and race.

"We read columns in the press each day about un-American activities. This Court feels there is no more reprehensible un-American activity than to attempt to deprive persons of their own homes on a 'Master Race' theory.

"Our nation just fought against the Nazi race superiority theory. One of these defendants was in that war and is a Purple Heart Veteran.

"This Court would indeed be callous to his constitutional rights, if it were now to permit him to be ousted from his own home by using 'race' as the measure of his worth as a citizen and neighbor.

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<sup>15</sup>Anderson v. Auseth, Los Angeles Superior Ct. No. 484808. Now on appeal taken by plaintiffs, see Note 3, *supra*.

"The alleged cause of action here is thus inconsistent with the guarantees of the Fourteenth Amendment to the Constitution. The Demurer is sustained without leave to amend."<sup>16</sup>

Judge Albert F. Ross, of the Superior Court of Orange County, rendered a judgment on the 18th day of September, 1943, in which he stated:

"It is hereby ordered, adjudged and decreed, that plaintiffs Ashley V. Doss and Anna Z. Doss, husband and wife, Oliver E. Schrunk and Virginia Schrunk, husband and wife, Charles R. Hobson and Marjorie M. Hobson, husband and wife, take nothing by their complaint, that the provisions of plaintiffs' deed providing 'That no portion of the said property shall at any time be used, leased, owned or occupied by any Mexicans or persons other than of the Caucasian race,' as respecting and concerning defendants Alex P. Bernal, a citizen of the United States and Esther Bernal a citizen and National of the Republic of Mexico is null and void as in violation of public policy in that said restriction has a tendency to be and is injurious to the public good and society; violative of the fundamental form and concepts of democratic principles, procedure and Government and inimical to the social and political policy of the Government of the State of California and the United States of America."<sup>17</sup>

<sup>16</sup>*Wright v. Drye*, Los Angeles Superior Ct. No. 535126.

<sup>17</sup>*Doss v. Bernal*, Orange County Superior Ct. No. 41466.



### Conclusion.

The rights involved here are basic to the free existence of millions of Americans. As we have shown, this discrimination prompted by commercial and monetary considerations, is growing with the speed and malignancy of a cancer. This growth has produced and is producing severe social strains and pressures. No remedies for these are apparent. The evil accomplished by a few pieces of paper in a day cannot be eradicated for many years or even generations.

We have come a long way in social awareness since the days of the *Civil Rights Cases*<sup>18</sup> and the decisions of this court have kept pace. These restrictive covenants are more than "mere discriminations"<sup>19</sup> or private wrongs which were held in the *Civil Rights Cases* to be beyond the purview of Federal legislative and judicial action. This problem cannot be ignored by the courts with the pious hope that it will be solved through the years by the gradual education and enlightenment of the people and the gradual development of tolerance and advanced social thinking. Strong, courageous and decisive judicial action invalidating private race restrictions is the only answer.

Your *amici curiae* most vigorously urge their support of the petitioners' position in this case, which are premised upon the same grounds urged in the cases, including

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<sup>18</sup>109 U. S. 3, 1883.

<sup>19</sup>109 U. S. at 25.

that of their client, pending before the Supreme Court of the State of California, to the effect that private contracts and covenants which attempt to bar the use and occupancy of real property to persons proscribed on account of race or religion, are in violation of the Fourteenth Amendment to the Constitution of the United States and are void and that this Court should so hold in the case at bar.

Respectfully submitted,

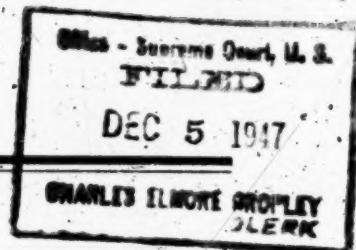
ISAAC PACT,  
IRVING HILL,  
CLORE WARNE,

*Amici Curiae.*

*Of Counsel:*

DOUGLAS BADT.

**FILE COPY**



IN THE

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OCTOBER TERM, 1947

No. 87

ORSEL MCGHEE and MINNIE S. MCGHEE, his wife,  
Petitioners,

—against—

BENJAMIN J. SIPES and ANNA C. SIPES, JAMES A.  
COON and ADDIE A. COON, ET AL.,  
Respondents.

**BRIEF OF THE HUMAN RELATIONS COMMISSION OF  
THE PROTESTANT COUNCIL OF THE CITY OF NEW  
YORK AS AMICUS CURIAE IN SUPPORT OF THE  
POSITION OF THE PETITIONERS.**

ROBERT McC. MARSH,  
EUGENE BLANC, JR.,  
Counsel for The Human Relations Com-  
mission of the Protestant Council of  
the City of New York, *amicus curiae*.

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THE PROTESTANT COUNCIL OF THE CITY OF NEW  
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POSITION OF THE PETITIONERS.**

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**OPINION BELOW.**

The opinion of the Supreme Court of the State of Michigan  
appears in the Record (R. 60-69) and is reported at 316  
Mich. 614.

## **JURISDICTION.**

The jurisdiction of this Court is invoked under Section 237b of the Judicial Code (28 U. S. C. 344b).

The date of the judgment of the Supreme Court of the State of Michigan is January 7th, 1947 (R. 70), and petitioners' motion for a rehearing was denied on March 3rd, 1947 (R. 80). A petition for certiorari was duly presented to this Court on May 10th, 1947 and was granted by this Court on June 23rd, 1947 (R. 81).

## **FACTS.**

This brief is filed on behalf of The Human Relations Commission of the Protestant Council of the City of New York because of the obvious importance of the questions of social and individual welfare involved in the decision which will affect large segments of urban populations.

The facts are adequately stated in petitioners' brief, to which reference is respectfully made.

## **SUMMARY OF ARGUMENT.**

I. The courts may not be used to destroy rights which are protected against infringement or deprivation by the constitutional guaranties of due process and equal protection of the laws.

II. In the light of present knowledge of the admixture of races, the restriction to persons of the "Caucasian race" has become so indefinite in meaning that its judicial enforcement violates the due process and equal protection clauses of the Fourteenth Amendment.

III. The question of whether the judicial enforcement of the racial restrictive covenant deprives petitioners of constitutionally guaranteed rights is a substantial federal question properly presented by the present record.

IV. Only the independent judgment of this Court can finally decide whether the enforcement of the discriminatory racial covenant by a state court violates the Fourteenth Amendment.

## ARGUMENT.

### POINT I.

**THE COURTS MAY NOT BE USED TO DESTROY RIGHTS WHICH ARE PROTECTED AGAINST INFRINGEMENT OR DEPRIVATION BY THE CONSTITUTIONAL GUARANTIES OF DUE PROCESS AND EQUAL PROTECTION OF THE LAWS.**

No state may, through its legislature, restrict the use or occupancy of land on the basis of race, without violating the Fourteenth Amendment.

*Buchanan v. Warley*, 245 U. S. 60;  
*Harmon v. Tyler*, 273 U. S. 668;  
*City of Richmond v. Deane*, 281 U. S. 704.

Moreover, the protection of the Fourteenth Amendment against infringement by a state extends to judicial as well as legislative action.

*Ex parte Virginia*, 100 U. S. 339, 346-347;  
*Chicago, Burlington & Quincy Railroad Co. v. Chicago*, 166 U. S. 226;  
*Twining v. New Jersey*, 211 U. S. 78, 90-91.

The racial restrictive covenant is not self-executing; it can be enforced only by judicial action, i.e., by a court which is a part of the government of the state. While a court has no concern with the private agreements of buyers and sellers, and can neither dictate the terms of a sale nor question the

voluntary observance of restrictions in a conveyance (*McGorney: Racial Residential Segregation by State Court Enforcement of Restrictive Agreements*, 33 Cal. Law Rev. 5, 20-21 [1945]), nevertheless constitutional limitations become relevant when one party seeks the aid of the state in the enforcement of the covenant against an unwilling occupant of the property. When the state acts, then it becomes the concern of this Court to decide whether the provisions of the Fourteenth Amendment have been violated. From this point of view, it is immaterial whether the state acts through its legislative, judicial, or executive branch, and the significant question is whether the action of the state, in whatever form exercised, deprives a citizen of rights protected by the Constitution.

The petitioners in this case are not parties to the covenant. Therefore, they have not as a matter of contract, waived any constitutional rights any more than a purchaser who merely takes title subject to an existing mortgage without any express assumption thereof, can be said to have contracted to be bound by its terms or to have waived the right to contest the validity of the mortgage or any other encumbrances upon the property.

It is indisputable that the occupation of property is a property right within the meaning of the Fourteenth Amendment, and equally indisputable that the defendants have been deprived of that right by the judgment appealed from solely because of their race and color. The judgment is therefore clearly unconstitutional because of its denial of both due process and the equal protection of the laws.

*Buchanan v. Warley, supra.*

In the present case the state's judicial action has in effect sanctioned the selection of a particular race for oppressive treatment, and the singling out of individuals of that race who are innocent of any offense.

In *Steele v. Louisville & Nashville Railroad Co.*, 323 U. S. 192, the question as stated by the Chief Justice, was whether

the Railway Labor Act which made one organization the exclusive bargaining representative of a class, imposed a correlative duty "to represent all the employees in the craft without discrimination because of their race, and, if so, whether the courts have jurisdiction to protect the minority of the craft or class from the violation of such obligation." The Supreme Court of Alabama had dismissed a complaint asking for injunctive relief against a bargaining agreement which discriminated against Negroes. This Court reversed, saying at page 198:

"If, as the state court has held, the Act confers this power on the bargaining representative of a craft or class of employees without any commensurate statutory duty toward its members, constitutional questions arise. For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights."

And also at page 202:

"We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, cf. *J. I. Case Co. v. Labor Board*, *supra*, 335, but it has also imposed on the representative a corresponding duty. We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for



whom it acts, without hostile discrimination against them."

Following this decision, a Circuit Court recently enjoined enforcement of a covenant in a collective bargaining contract which in fact, although not in terms, discriminated against Negroes.

*Brotherhood of Locomotive Firemen and Enginemen v. Tunstall*, 163 F. (2d) 289 ( C. C. A. 4th, 1947).

Moreover, Section 1978 of the Revised Statutes, 8 U. S. C. A. 42, provides that "all citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

This section includes rights which are protected by the Fourteenth Amendment.

*Hague v. C. I. O.*, 307 U. S. 496.

Like the bargaining representatives in the *Steele* case, courts are, in the present case, the exclusive agencies for the enforcement of the rights and duties arising out of the restrictive covenant. The Civil Rights Act, like the Railway Labor Act, thus imposes upon the courts, and other agencies of government, a duty not to enforce covenants which are unenforceable except by court action, and which when so enforced have the effect of directly violating the statute. Just as the Railway Labor Act was said to have made the bargaining agent in effect a legislature, and thus impliedly imposed the constitutional limitations against discrimination, so the decree now under review has the same effect as a legislative discrimination, and hence, both impliedly, and because of the Civil Rights Act, the constitutional limitations apply to its action.

## POINT II.

**IN THE LIGHT OF PRESENT KNOWLEDGE OF THE ADMIXTURE OF RACES, THE RESTRICTION TO PERSONS OF THE "CAUCASIAN RACE" HAS BECOME SO INDEFINITE IN MEANING THAT ITS JUDICIAL ENFORCEMENT VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.**

The Covenant in suit restricts the occupation of the property to "those of the Caucasian race." As a matter of common knowledge, the great melting pot which is the source and pride of the genius of America makes it impossible for any one now to say *with certainty* that he is "of the Caucasian race." The highest point of this fallacy of racial purity was reached in Nazi Germany's "Aryan" concept, and exploded in a way that leaves civilization still trembling and scientists more than ever convinced that there is now no such thing as a pure racial strain, whether that be denominated Aryan or Caucasian, Jew, White, or Negro. The testimony in this case (R. pp. 27-30) is clearly and definitely to this effect, and to the effect that it is now no longer possible to determine positively and finally, with respect to every individual, whether or not he is exclusively Caucasian. Admixture of races over the centuries has completely broken down the purity and exclusiveness of the assumed original strains, so that the determination of the racial derivative is a matter of delicate and subtle measurement, within the competence of trained experts only. The apparent color is not now a determinative index.

Since complete demonstration of absolute Caucasian purity is not scientifically practicable, it follows that if the covenant means only pure Caucasian, it is entirely lacking in content, and if it means less than pure, it is obvious that there is nothing from which a court may determine the degree of purity which was intended. The record in this case illustrates precisely this difficulty, for the testimony (R. p.

22) is to the effect that one of the petitioners (Mrs. McGhee) "appears to be the mulatto type" (R. p. 23). This means that she had an admixture of white, i.e. Caucasian, blood, but to an unknown (and no doubt unascertainable) degree. Since the restrictive covenant, on the testimony in this case, can have no meaning as applied to only one hundred per cent pure Caucasians, and must mean something less, then has petitioner come within it? Clearly, the covenant is so uncertain, that this question cannot be answered by any court, and is certainly not answered on this record. Assuming occupancy by persons apparently white, but later shown to have a small admixture of Negro blood, would the covenant apply on the theory that the "Caucasian" status had been forfeited? And what percentage of Negro blood would the covenant tolerate before an equity court would be asked to act? Is the protagonist in Sinclair Lewis' novel, *Kingsblood Royal*, a member of the Caucasian race? It cannot be said that apparent color alone is the deciding test, because there also are gradations (R. p. 30, fol. 49) which the covenant does not attempt to define, and if that were the test, the covenant would exclude dark Caucasoids and light or white Negroids (R. p. 29).

In *Clayton v. Ramsden* (1943), 1 All E. R. 16, 168 Law Times Reports 113, the House of Lords had before it the question of the validity of a condition subsequent in a devise of real estate to the effect that if a devisee "should contract a marriage with a person who is not of Jewish parentage and of the Jewish faith," the devise should be ineffective. Lord Romer adopted the argument that the racial description had become so indefinite because of the admixture of races that it was impossible to determine what was meant, and therefore the covenant was void for uncertainty. He said:

"What, then, did the testator mean by the stipulation that the daughter's husband was to be of Jewish race or descent? It cannot reasonably be supposed that the husband was to show an unbroken line of

descent from the patriarch Jacob. If the daughter were compelled to wait for such a husband she would remain a spinster all her life and the condition would be void as amounting to a total restraint on marriage. It seems far more probable that the testator meant no more than that the husband should be of Hebraic blood. But what degree of Hebraic blood would a permissible husband have to possess? Would it be sufficient if one only of his parents were of Hebraic blood? If not, would it be sufficient if both were? If not, would it be sufficient if in addition it were shown that one grandparent was of Hebraic blood or must it be shown that this was true of all his grandparents? Or must the husband trace his Hebraic blood still further back? These are questions to which no answer has been furnished by the testator. It was therefore impossible for the court to see from the beginning precisely or distinctly upon the happening of what event it was that Mrs. Clayton's vested interests under the will were to determine, and the condition is void for uncertainty."

*In Re Blaiberg-Blaiberg and Public Trustee v. De Andia Yrarrazaval*, 162 Law Times Reports 418 (1940), Ch. 385, a similar forfeiture clause was considered by the High Court of Justice, Chancery Division. The court held that a description by reference to a faith or a race was too indefinite for enforcement by a court. We submit that for the purpose of testing its enforceability against the barrier of due process the term "Caucasian" has likewise become too indefinite and uncertain.

What really has happened is that the increase in scientific anthropological knowledge and the inexorable process of dilution, over the centuries, of so-called pure racial strains has so diminished the content of the racial restrictive covenant and of the term "Caucasian" as used therein, that the residue which is left is insufficiently definite to call into play the machinery of a court of equity. The law is not insensitive to such changes in scientific concepts, nor is it so inflexible that it must slavishly follow, in an equitable action,



precedents decided when the state of general or scientific knowledge gave apparent certainty to the terms used in a restrictive covenant. There can be no more striking example of Mr. Justice Holmes' famous sentence: "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

In analogous situations, indefinite classifications established by state legislatures and permitting of arbitrary state action have been recognized as raising constitutional questions of due process and equal protection despite the state's own judicial approval of the legislative distinctions.

*Skinner v. Oklahoma*, 316 U. S. 535.

In that case the Oklahoma statute for the sterilization of certain criminals, and the exemption of others from sterilization, was held to violate the equal protection clause, and, by the concurring opinions, to violate also the due process clause. The basis of decision was that a line of demarcation had been established by the state which had no "significance in eugenics" and which thus permitted a court to find one individual to be on one side of the line or the other for arbitrary reasons. The Court (per Douglas, J.) said:

"... strict scrutiny of the classification which a State makes in a sterilization law is essential, lest, unwittingly or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws. The guaranty of 'equal protection of the laws' is a pledge of the protection of equal laws.' *Yick Wo v. Hopkins*, 118 U. S. 356, 369. When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."

(316 U. S. *supra*, at p. 541.)



The inherent unsoundness of attempting to identify specific individuals as members of racial groups necessarily defined in general and inexact terms, is illustrated by *In re Drummond Wren* (1945), 4 Dom. L. Rep. 674, Ont. Rep. (1945) 778, Ont. Wkly. Notes (1945) 795, in which a covenant against ownership of land by "Jews or other persons of objectionable nationality" was stricken down. In that case, the action was brought under the Conveyancing and Law of Property Act of Canada to have declared invalid the restrictive covenant just mentioned. One argument accepted by the Court was that the covenant was void for uncertainty, the Court saying:

"Counsel for the applicant contended before me that the restrictive covenant here in question is void for uncertainty. So far as the words 'persons of objectionable nationality' are concerned, the contention admits of no contradiction. The conveyancer who used these words surely must have realized, if he had given the matter any thought, that no Court could conceivably find legal meaning in such vagueness. So far as the first branch of the covenant is concerned, that prohibiting the sale of the land to 'Jews', I am bound by the recent decision of the House of Lords in *Clayton v. Ramsden* (1943), 1 All E. R. 16; to hold that the covenant is in this respect also void for uncertainty; and I may add, that I would so hold even if the matter were *res integra*. The Law Lords in *Clayton v. Ramsden* were unanimous in holding that the phrase 'of Jewish parentage' was uncertain, and Lord Romer was of the same opinion in regard to the phrase 'of Jewish faith'. I do not see that the bare term 'Jews' admits of any more certainty."

Accordingly it should be held that in the light of present scientific anthropological knowledge the racial restrictive covenant is so devoid of precise and definite meaning that its enforcement by an agency of the government would violate the constitutional limitations imposed by the due process and equal protection clauses.

## POINT III.

**THE QUESTION OF WHETHER THE JUDICIAL ENFORCEMENT OF THE RACIAL RESTRICTIVE COVENANT DEPRIVES PETITIONERS OF CONSTITUTIONALLY GUARANTEED RIGHTS IS A SUBSTANTIAL FEDERAL QUESTION PROPERLY PRESENTED BY THE PRESENT RECORD.**

Attempts at racial discrimination by whatever means have consistently been regarded as raising substantial federal questions requiring the application of constitutional tests.

*Yick Wo v. Hopkins*, 118 U. S. 356 (local ordinance);

*Missouri ex rel Gaines v. Canada*, 305 U. S. 337 (state statutes);

*Steele v. Louisville & Nashville Railroad Co.*, *supra* (collective bargaining agreements).

And conversely, state legislation affirmatively carrying out the policy of nondiscrimination so often announced by this Court, likewise raises a substantial federal question, but one to which the answer must be that such legislation is consonant with, and does not transgress, the Fourteenth Amendment.

*Railway Mail Association v. Corsi*, 326 U. S. 88 (upholding New York Civil Rights Law § 43).

As the Negro population increases in number, concentration and importance, and becomes more widely distributed geographically, all the evils so vividly described in petitioners' brief (pp. 47-84) become cumulatively worse and increasingly matters of national concern. As Professor Dodd has said, there is a basis for increasingly greater federal concern "in changed economic and social conditions . . . which make national problems which were once local." (American Political Science Review, Feb., 1947, Vol. XLI

No. 1 at p. 4.). The tremendous social and economic forces set in play throughout the country by the judicial enforcement of the restrictive covenant are the background against which the question must be projected.

The actual harm done to the Negro by the covenant, the restrictions on his normal living, the cumulative effect on his ability to earn a living and to be free from other forms of racial segregation, the denial of his right to buy and use property which a willing seller is ready to sell to him—all these wrongs to a large number of citizens throughout the nation present a federal question of the greatest importance. When they are caused and aggravated by the action of a governmental agency which alone can enforce the covenant, they become the proper subject of action by this Court, and demand constitutional condemnation.

See Mr. Justice Murphy, concurring in *Steele v. Louisville & Nashville Railroad Co.*, *supra*, at page 208.

*Corrigan v. Buckley*, 271 U. S. 323, does not stand in the way of this conclusion. The analysis of this case in the brief of the petitioners, at pages 42-46, and similar analyses in the briefs of the petitioners in the related cases which are being heard together, sufficiently demonstrate this point, and no detailed repetition of those analyses is required here.

The important distinction to be noted is that *Corrigan v. Buckley* reached the Supreme Court on appeal (not on writ of certiorari) and it was held that the contention that the decrees of the courts below violated the Fifth and Fourteenth Amendments "cannot serve as a jurisdictional basis for the appeal," and that the contention, "if of a substantial character," was not raised below and hence unavailable on the appeal.

In this case, however, the very question now to be decided, arising on a writ of certiorari, was adequately raised in all the lower courts, and presents the substantial constitutional question of whether the state's enforcement of the restrictive covenant through the machinery of its courts, sheriffs and, if necessary, jails and jailers, violates the due process clause.

and the equal protection clause of the Fourteenth Amendment.

It is true that zoning ordinances and restrictions against uses such as stables, factories and distilleries have been upheld, but with ample justification in some aspect of the police power, asserted for the public welfare.

*Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365;

*Cowell v. Springs Company*, 100 U. S. 55;

*Reinman v. Little Rock*, 237 U. S. 171.

Obviously, however, decisions upholding restrictions of this nature on the use of real property regardless of the race of the occupant, are not applicable to covenants restricting the occupation of the land on racial grounds regardless of the use to which the land is put.

This distinction has been argued at length in petitioners' brief at pages 15-18.

#### POINT IV.

**ONLY THE INDEPENDENT JUDGMENT OF THIS COURT CAN FINALLY DECIDE WHETHER THE ENFORCEMENT OF THE DISCRIMINATORY RACIAL COVENANT BY A STATE COURT VIOLATES THE FOURTEENTH AMENDMENT.**

The Supreme Court of Michigan has determined as a matter of its local law that the discriminatory racial covenant may be enforced by the State of Michigan. The question for this Court is not as to the correctness of this decision under local law, for on that question *Erie Railroad Company v. Tompkins*, 304 U. S. 64 (1937), would make the state law the final authority.

The true question is whether enforcement by the state violates the constitutional guaranties of due process and equal protection. On this question, this Court, and this



Court alone, is the final arbiter, no matter what the decision of the state court. As long ago as 1885, this Court, for the purpose of deciding the constitutional question, rejected the construction which a state court had put on local ordinances used to discriminate against Chinese, and, while admitting that the opinion of the state court should be accepted on matters of state concern alone, declared the principle to be otherwise in connection with questions arising under the federal Constitution. The Court said:

"That, however, does not preclude this court from putting upon the ordinances of the supervisors of the county and city of San Francisco an independent construction; for the determination of the question whether the proceedings under these ordinances and in enforcement of them are in conflict with the Constitution and laws of the United States, necessarily involves the meaning of the ordinances, which, for that purpose, we are required to ascertain and adjudge."

*Yick Wo v. Hopkins*, 118 U. S. 356, 366.

Applying this principle to a decision of the Supreme Court of California, which had sanctioned administrative discriminations against the operation of laundries by Chinese, the Court continued:

"The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution."

*Yick Wo v. Hopkins*, *supra*, at page 374.

In other words (to paraphrase the language of Mr. Justice Field, dissenting, in *Baltimore & Ohio Railroad Company v.*



*Baugh*, 149 U. S. 368, 401), notwithstanding what interpretation may have been put upon the covenant by a state court, and notwithstanding how many times the machinery of a state court has been called into play for its enforcement, "there stands as a perpetual protest against its repetition the Constitution of the United States."

### CONCLUSION.

**THE JUDGMENT OF THE SUPREME COURT OF MICHIGAN SHOULD BE REVERSED.**

Respectfully submitted,

**ROBERT McC. MARSH,  
EUGENE BLANC, Jr.,**  
Counsel for The Human Relations Commission of the Protestant Council of the City of New York, *amicus curiae*.

FILE COPY

Nos. 87, 290, 291

**In the Supreme Court of the United States**

**OCTOBER TERM, 1947**

ORSEL MCGHEE and MINNIE S. MCGHEE, his wife,  
*Petitioners,*

BENJAMIN J. SIPES and ANNA C. SIPES, JAMES A. COON and  
ADDIE A. COON, et al,  
*Respondents.*

JAMES M. HURD and MARY I. HURD,  
*Petitioners,*

FREDERIC E. HODGE, LENA A. MURRAY HODGE,  
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PASQUALE DERITA, et al,  
*Respondents.*

**ON WRITS OF CERTIORARI TO THE SUPREME COURT OF  
MICHIGAN AND THE COURT OF APPEALS OF  
THE DISTRICT OF COLUMBIA**

**MOTION OF THE MOUNT ROYAL PROTECTIVE  
ASSOCIATION, INC., FOR LEAVE TO FILE  
BRIEF AS AMICUS CURIAE AND BRIEF  
OF AMICUS CURIAE.**

THOMAS F. CADWALADER,  
CARLYLE BARTON,

Counsel for The Mount Royal  
Protective Association, Inc.

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ON WRITS OF CERTIORARI TO THE SUPREME COURT OF  
MICHIGAN AND THE COURT OF APPEALS OF  
THE DISTRICT OF COLUMBIA

## **MOTION OF THE MOUNT ROYAL PROTECTIVE ASSOCIATION, INC., FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.**

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES  
AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT  
OF THE UNITED STATES:

The Mount Royal Protective Association, Inc., respectfully moves for leave to file the accompanying brief as *amicus curiae* for the following reasons:

1. The decisions in the cases are of vital consequence to the membership of The Mount Royal Protective Association, Inc. An explanation of the interest of this Association is set forth in the accompanying brief.

2. Counsel for petitioners and respondents in each of these cases have given their consent to the granting of this motion.

THOMAS F. CADWALADER,  
CARLYLE BARTON,

Counsel for The Mount Royal  
Protective Association, Inc.

# In the Supreme Court of the United States

OCTOBER TERM, 1947

Nos. 87, 290, 291

ORSEL McGHEE and MINNIE S. McGHEE, his wife,

*Petitioners,*

v.

BENJAMIN J. SIPES and ANNA C. SIPES, JAMES A. COON and  
ADDIE A. COON, et al,

*Respondents.*

JAMES M. HURD and MARY I. HURD,

*Petitioners,*

v.

FREDERIC E. HODGE, LENA A. MURRAY HODGE,  
PASQUALE DERITA, et al,

*Respondents.*

RAPHAEL G. URCIOLO, ROBERT H. ROWE, ISABELLE J. ROWE, et al,

*Petitioners,*

v.

FREDERIC E. HODGE, LENA A. MURRAY HODGE,  
PASQUALE DERITA, et al,

*Respondents.*

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF  
MICHIGAN AND THE COURT OF APPEALS OF  
THE DISTRICT OF COLUMBIA

**BRIEF OF AMICUS CURIAE.**



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## **STATEMENT OF THE INTEREST OF THE MOUNT ROYAL PROTECTIVE ASSOCIATION, INC.**

The Mount Royal Protective Association, Inc. is a body corporate incorporated under the laws of the State of Maryland for the purpose of representing the property owners in a residential part of the City of Baltimore commonly known as the Mount Royal District. This area extends from Mount Royal Avenue on the northeast to and including Eutaw Place on the southwest and runs northwesterly from Dolphin Street to Druid Hill Park, which forms the northwestern boundary of the district. It is about six city blocks in width and a maximum of nine in length, the upper part of the district being somewhat irregular in shape. The corporation is a non-profit organization and its main functions have been to represent the interest of the property owners in such matters as zoning laws, the invasion of this residential district by commercial or otherwise undesirable enterprises and in general to support the efforts of the inhabitants to secure the amenities of life within the neighborhood.

Since 1921 it has fostered, as one of its activities, a movement, begun by others, to induce property owners to preserve the neighborhood for the use of white residents by executing covenants, to be recorded among the Land Records of Baltimore City, respecting the use to which the several properties could be put to the end that they could not be occupied by negroes or persons of African descent except those employed as domestic servants by the occupants. A copy of the form of covenant which was used is filed as an appendix to this brief. Over ninety percent of the residence properties in the district have been subjected to this restriction by this means. The restric-

tion has been kept in force, and attempted violations have been quashed by threatened suits or by injunctions obtained from local equity courts, with the result that the properties covered by the covenant have been completely restricted in fact to occupancy by white people.

There are other parts of the city of Baltimore where similar restrictions have been agreed to and put on record by the property owners, but many have not been fully enforced, and as a consequence much residential property in the city which was sought to be restricted against negro occupancy by this means has become occupied by persons of that race. In such instances the doctrine of the Maryland courts is that the covenant against such occupancy is no longer enforceable. In particular, the territory immediately adjoining the Mount Royal District lying to the southwest of Eutaw Place and of greater area is almost exclusively occupied by colored people. The same is true of much of the rest of the older part of Baltimore City. These are not in any sense of the word slum districts and although there are slums in Baltimore, both white and negro, it would be utterly untrue to say that the practice of voluntary restrictive covenants in Baltimore has resulted in forcing the large negro population to congregate in districts of sub-standard housing and inadequate public services. The colored area and the white area in northwest Baltimore are almost identical in physical characteristics and the quality of the dwellings is equivalent.

It is generally true, however, that when some of the dwellings in a block become occupied by colored people, the white inhabitants move away at the first opportunity, so that in the course of a few years the block becomes wholly occupied by negroes. In the past this usually resulted in a great depreciation in the value of the property,

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and white owners have often been compelled to sell their properties at a loss, but this is no longer necessarily true. In fact, especially during the war years, much property has recently passed from white into negro hands at a profit to the white owners. Nevertheless many white owners object strongly to being forced to part with their homes and move elsewhere even if they can do so without financial loss, and yet they feel that once negroes occupy property in the same block they could not remain without losing contact with their friends and finding themselves in a wholly uncongenial atmosphere. Thus, as a general rule, it is considered advantageous, from the standpoint of property value as well as personal convenience and happiness, to own residential property which is located in a section where covenants against negro occupancy exist and are enforced.

This court has before it the question of the validity of restrictive covenants substantially similar in effect to those executed by the members of The Mount Royal Protective Association, Inc. Should such covenants be held invalid for constitutional reasons, the effects on the social life and economy of the entire City of Baltimore would be extremely serious. It is for this reason that the Association has filed a motion asking that it be allowed to file a brief as *amicus curiae* in these cases.

## ARGUMENT.

### I.

#### PRIVATE CONTRACTS CONTAINING RACIAL RESTRICTIONS NOT INVALID.

The right of property owners to contract with each other, for their mutual benefit, protection or advantage, to subject their property to restrictions has long been recognized.



in all our jurisdictions. The limits of this right also form an important branch of the substantive law in every state. Among these conceded limitations, and probably the oldest and best established of them, is that which forbids restraints on alienation. No such restraints appear in the covenants signed by the members of this Association or any other similar covenants, with which we are familiar, that have been executed by owners of property in the City of Baltimore. The restrictions are only as to use and occupancy.

The City of Baltimore is one of the few very large cities in this country containing a large proportion of negroes which has been singularly free from the race riots that have disfigured and disgraced many other communities. Any impartial observer conversant with the facts of city life would testify that this immunity is not unconnected with the fact that the races have been physically separated to a great extent and for the most part are not closely mingled in the same blocks. It should be remembered, of course, that in this city, as in other eastern cities, the bulk of the population resides in solid rows of houses, not in detached dwellings, so that neighbors are in much closer physical proximity to each other than they ever are in the newer cities of the West. That there was much crime and disorder during the war years when the working population, white and black, were very much congested is true, but the fact remains that outbreaks that could properly be called riots have not occurred.

The City and State have done nothing through laws or ordinances to cause the segregation of the races into separate blocks or sections except that in building new housing developments assisted by funds of the Federal Housing Administration, it has been uniform procedure to designate



the developments for either white or colored occupancy. It would have been utterly contrary to the sentiments and wishes of the population if any of these developments had been thrown open to an indiscriminate mixture of the races, and we submit that few persons conversant with local affairs believe that this could have been done without inviting much disorder and many breaches of the peace. However, this Association had no concern with these housing developments, for its membership consists entirely of the owners of private dwellings and apartment houses in a certain defined geographical section of the city, who have agreed among themselves to restrict the land and buildings they own against occupancy by those of the negro race except as household servants employed therein.

The question before the Court is whether any clause of the United States Constitution is violated by these private contracts. Certainly no one of the first eight amendments to the Constitution contains any language that by any sort of interpretation could be held to affect them. The covenants deprive nobody of life, liberty, or property. The owners of the restricted premises have voluntarily agreed to the restrictions and their enforcement cannot be said to be an unconstitutional deprivation of property rights insofar as the owners are concerned. A prospective buyer has no liberty or right to enter upon and occupy the property of a seller who has contracted to devote it to another use.

Certainly no privileges or immunities of citizens of the United States are involved. *Maxwell vs. Dow*, 176 U. S. 581 (1900).

The only other question would arise under the Fourteenth Amendment, i.e., whether any rights of liberty or property protected by that amendment are violated with-

out due process of law. Is a voluntary agreement between property owners as to the use and occupancy of their property such as they have been authorized to make throughout all history, a deprivation of liberty or property rights in others than the owners? The question seems to answer itself.

If the Fourteenth Amendment is considered as importing some of the same rights guaranteed by the original Bill of Rights to citizens of the United States as a restriction upon action taken within the states, *Palko v. Connecticut*, 302 U. S. 319 (1937); even though not by state action, then it must be remembered that the non-enumerated rights protected by the Ninth Amendment are also subject to protection. Among these non-enumerated rights is certainly the right to regulate the occupancy and use of property by private contract. Such right clearly existed at the date the Bill of Rights was adopted and nothing has since occurred to limit it.

It may be argued that the right of private contract never extended to contracts considered to be against public policy. Still it has not yet been held, except under the Commerce Clause, that public policy as affecting private contracts presents a Federal question. So long as any of the fundamental freedoms referred to in the opinion of Cardozo, J., in *Palko vs. Connecticut*, *supra*, are not affected, there could be no such Federal question. In general what constitutes public policy is a matter for the several states to determine, and always has been so recognized. Can it be said that the adoption of the Fourteenth Amendment made any change in this regard? Certainly the *Slaughter House Cases*, 16 Wall. 36 (1873), which have been consistently followed, strongly negative any such theory.

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In the year 1937 the validity of a similar covenant, or neighborhood agreement as these restrictions have come to be known, came before the Court of Appeals of Maryland in the case of *Meade vs. Dennistone*, 173 Md. 295 (1937), and was fully argued there. It was held that the covenant although expressed to "run with the land", as is the case with the covenant used by this association, was not within that class of covenants because of the absence of privity of estate between the covenantors and covenantees. However, it was stated that such covenants imposed a "servitude, or easement, or right of amenity, protected in equity", *Meade vs. Dennistone, supra*, p. 303. The question as to whether these contracts denied the negro defendant equal protection of the laws was considered and answered with the citation of the numerous decisions reached in the Supreme Court holding that this Constitutional inhibition was upon the power of the State but not on the right of individuals to contract with respect to their property. The test of these cases cited was *Corrigan vs. Buckley*, 271 U. S. 323 (1926), in which this Court unanimously held that the contention that the contract violated the Fifth, Thirteenth and Fourteenth Amendments, was "entirely lacking in substance or color of merit. \* \* \* None of these amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property." In accordance with this binding decision the Maryland Court of Appeals held that the constitutional question had been settled by final authority. *Meade vs. Dennistone, supra*, p. 302. It was also held that the restriction was not void as a restraint on alienation, because it contained no such restraint, citing the following cases, all of which indicate that covenants restricting use and occupancy by negroes but not restricting alienation of negroes are valid, *Meade vs. Dennistone, supra*, p. 307;

*Cowell vs. Colorado Springs Co.*, 100 U. S. 55 (1879);  
*Wayt vs. Patee*, 205 Cal. 46 (1928);  
*Janss Investment Co. vs. Walden*, 196 Cal. 753 (1925);  
*Parmalee vs. Morris*, 218 Mich. 625 (1922);  
*Los Angeles Investment Co. vs. Gary*, 181 Cal. 680 (1919);  
*Brown vs. Hobbs*, 132 Md. 559 (1918);  
*Mandlebaum vs. McDonell*, 29 Mich. 78 (1874).

In *Parmalee vs. Morris*, *supra*, the Court used the following language in its opinion:

"The law is powerless to eradicate racial instincts or to abolish distinctions which some citizens do draw on account of racial differences in relation to their matter of purely private concern. For the law to attempt to abolish these distinctions in the private dealings between individuals would only serve to accentuate the difficulties which the situation presents. \* \* \* Whether this action on the part of the owner was taken to make the neighborhood more desirable in his estimation or to promote the better welfare of himself and his grantees is a consideration which I do not believe enters into a decision of the case."

It is true the Fourteenth Amendment made negroes citizens of the United States and of their respective states, equal in all civil and political rights with white citizens, but how are the civil or political rights of either race limited by the covenants under consideration? Persons of either race are free to agree among themselves to place the same sort of restrictions upon property holdings. The law of Maryland, and of other states also, is well settled that such restrictions are subject to the same general rules as other restrictions such as those having to do with the use to which property may be put, the set-

backs from the property line that must be observed, the height, style or materials to be used in construction, and even the cost of the building. All these and other restrictions are sustained as being valid when they are part of a general plan of improvement or preservation of a neighborhood, but if they are allowed to lapse so that the neighborhood is no longer in the same condition as when the restrictions were imposed, they are held to be no longer enforceable.

It is very clear that if 90% or 100% of the property owners in certain Baltimore blocks restrict their properties against negro occupancy and then permit such occupancy to occur without taking steps to enforce the restriction, they will be held to have waived it so that it will no longer be enforceable in the Maryland courts. This has actually occurred and much property in the City of Baltimore is now occupied by negroes on which restrictive covenants against such occupancy have been recorded, but because the owners of the property affected failed to stand on their contract rights at the proper time, the restrictions have completely lapsed. They are only effective where the owners in the restricted area consistently maintain these restrictions by timely application for relief against their violation.

In considering the constitutional question here involved, viz: whether rights guaranteed citizens of the United States by the Fourteenth Amendment are denied when a state, through its courts, refuses to invalidate restrictions of the type under review as contrary to public policy; another factor must be given full cognizance. This is the fact that ordinarily local authorities have been charged with the duty of minimizing tension and preventing public disorder that has always resulted when different races have



lived side by side in the same territory, under the same government. In the United States, the only large and populous area where two such races reside side by side with the same legal and civil rights, there is little if any social intermingling. In many states of the Union, including Maryland, intermarriage between the races is not permitted and is punishable as a crime. Separate schools are provided. The Federal courts have always recognized the right of the states to segregate pupils provided each race is afforded equal opportunities for education. No doubt it would be a deprivation of property rights if either race were not permitted to acquire title to property under the same terms as the other, or if the law interposed arbitrarily to forbid certain properties to be occupied by either race. Segregation ordinances of this character were passed in several cities, including Baltimore and Annapolis, but have been held void in accordance with the decision of this Court in *Buchanan vs. Warley*, 245 U. S. 60 (1917); *Jackson vs. State*, 132 Md. 311 (1918). But to say that property owners themselves cannot by agreement limit the occupancy of the neighborhood where they reside to such classes of tenants as are in accord with their views or prejudices would be an exceedingly long step towards invading the sphere of social conventions and what are called in the civil law "imperfect obligations", and a step which no courts of the common law have yet taken.

This Court has unanimously declined jurisdiction over the determination of the public policy of a local government with respect to this very matter. *Corrigan vs. Buckley*, *supra*.

## II.

**THE NON-ENUMERATED RIGHT OF PRIVATE AGREEMENT  
IS PROTECTED BY THE BILL OF RIGHTS.**

The United States never accorded to Indians the same rights as to white citizens. It has permitted, and indeed created, a discrimination against Chinese and other Asiatics. But its policy has been, for one reason or another, to impose a doctrine of absolute civil equality between negroes and whites. This has been a tremendous experiment. It was looked upon with grave misgivings at the time the Fourteenth Amendment was declared adopted, and, indeed, has been ever since, by a substantial part of the population including many devoted to the ideal of treating negroes with the same impartial justice as we demand for white men. But when the intimate relations of the members of the two races can no longer be regulated by voluntary and peaceful action of the people most concerned, the experiment of 1868 will have been expanded into a much more hazardous experiment, in short the attempt to impose by legal fiat a commingling of racial stocks to which the majority in number of both races is at heart bitterly opposed.

Surely the right of individuals to regulate their contacts with other individuals through the system of private clubs and associations, both religious and secular, through the intricate system of social conventions and manners and private agreements, which regulate the daily lives of people everywhere, is one of those rights that never were enumerated in any Bill of Rights but have always been recognized as inherently belonging to free people in a free society.

What meaning can be given to the Ninth Amendment other than a command that such rights be respected by

Congress? Some of the states may have invalidated certain of these rights, and may possibly have outlawed the right of restrictive covenants here in question, by declaring them against their public policy. But compared to the United States, the States are relatively small and compact and their governments directly responsible to local public opinion. It is no part of the concept of liberty to force unwilling communities into the same Procrustean bed. If the right to restrict the use of property on racial grounds is not one of the freedoms included in the due process clause of the Fourteenth Amendment, by importing therein the Ninth Amendment, it is at least a right which the Congress has never been given power to change or abolish. In other words, if this right is not protected against such action by the commands of the Fourteenth Amendment regarding State powers, it certainly remains one of those rights which, under the Tenth Amendment, the states alone can regulate. It is clear that it is not subject to regulation by any affirmative act of Congress and it also is clear that if Congress should ever claim such a power, the provisions of the Ninth Amendment would be contravened.

### III.

#### ENFORCEMENT BY STATE COURTS OF VALID PRIVATE CONTRACTS IS NOT A DENIAL BY THE STATE OF ANY CONSTITUTIONAL RIGHT.

A single question remains. Assuming that individuals have a right to limit the use of their property as they please, does the State have a right, by the process of its courts, to enforce these private agreements, embodying, as they do, discrimination which is considered arbitrary by some because based on distinction of race rather than of occupation or economic status?

It is respectfully submitted that the answer may be briefly stated thus: If individuals have the right to con-

tract with each other for what they consider their own benefit or protection and it be admitted that such contracts are in themselves not illegal, then the States have a right to give these contracts the sanction of legal enforcement to the same extent as any other agreement. The act of discrimination resides in the private agreement not in the process of enforcement. To say that individuals may lawfully contract with each other to discriminate against other individuals, but that if they do, the courts cannot enforce such contracts is a contradiction in terms. If the power to enforce is struck down, then the contracts themselves are struck down, or at least relegated to the sphere of "imperfect obligations" above referred to. The next step would be to forbid even incurring such obligations and punishing them as conspiracies. This brings the pretended protection of human liberty full circle into a deprivation of the most elementary rights of freedom of association and freedom of choice.

### CONCLUSION.

The effort to protect the fundamental rights of persons of widely different races living together is bound to fail unless the members of the population are permitted to make the necessary adjustments by their free and untrammelled action so long as they do not trench on the essential liberties of anybody. No person has the essential liberty to occupy another's land whether the owner refuses him admission by reason of an unjustifiable prejudice or mere whim. Prejudices cannot be eradicated by law. This is specially true of certain so-called prejudices, which many persons feel are not prejudices at all but a mere recognition of the facts of life and nature. In countries where the color line in social relations has been completely obliterated the favorable results, if any, are not so impressive as to lead prejudiced persons to discard their feelings

completely. If the experiment of complete civil equality between races is to be given a chance for ultimate success, it is necessary that scope be allowed for such fair and voluntary adjustments of an inescapable problem as the people themselves will make in view of the particular conditions in their respective localities and neighborhoods. If this right is to be outlawed in this country the future of a satisfactory solution of this extremely delicate and difficult question will be dark indeed.

Respectfully submitted,

THOMAS F. CADWALADER,  
CARLYLE BARTON,

Counsel for The Mount Royal  
Protective Association, Inc.



## APPENDIX.

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### FORM OF RESTRICTIVE COVENANT.

**WHEREAS**, the following parties hereto are seized or possessed of the following properties in the City of Baltimore, in the State of Maryland, following their respective names, of some interest or estate therein:

**Names**

**Properties**


**AND WHEREAS** the said parties hereto are desirous of entering into an agreement protecting their respective properties in the particulars hereinafter provided for;

Now **THEREFORE** each and all of said parties, in consideration of the execution of these presents, and of the mutual covenants, agreements and stipulations herein contained, and other good and valuable considerations to them, and each of them, thereunto moving, the receipt whereof by each and all of them is hereby acknowledged, do hereby jointly and severally for themselves, and each of themselves, their, and each of their heirs, personal representatives, successors and assigns, grant, warrant, covenant, promise and agree among themselves, and each and all of them with all and each of the others, their and each of their heirs, personal representatives, successors and assigns, that they, and each of them, their, and each of their, heirs, personal representatives, successors and assigns, shall and will have hold and stand seized and possessed of the said re-

spective properties, interests and estates subject to the following restrictions, limitations, conditions, covenants, agreements, stipulations, and provisions, to wit: That neither the said respective properties, nor any of them, nor any part of them, or any of them shall be at any time occupied or used by any negro or negroes, or person or persons, either in whole or in part, of negro or African descent, except only that negroes, or persons of negro or African descent, either in whole or in part, may be employed as servants by any of the owners or occupants of said respective properties and as and whilst so employed may reside on the premises occupied by their respective employers.

That no sale, lease, mortgage, disposition or transfer thereof shall be made or operate otherwise than subject to the aforesaid restrictions as to and upon use and occupancy; that neither the said parties, nor any of them, their, or any of their, heirs, personal representatives, successors, or assigns, will do, or suffer or permit to be done, any of the matters or things above mentioned, excepting only as aforesaid, and then all the restrictions, limitations, conditions, covenants, agreements, stipulations, and provisions, herein contained shall run with and bind the land, and each and all of the above mentioned property and premises, and every part thereof, and the heirs, personal representatives, successors or assigns, of each and all of the parties hereto, and shall be kept and performed by, and enure to the benefit of, and be enforceable by, all and every person and persons, and bodies politic or corporate, at any time owning or occupying said land, property, premises or interests, or estates, or any of them, or any part of them; but no owners or occupants shall be responsible except for his, her or its acts of defaults, while owner or occupants.

Provided that the above restrictions and agreements or any of them in whole or in part may be removed at any time by a deed executed by the then owners of 51% of the properties effected by this agreement.

Witness the hands and seals of the parties hereto.

Witnesses to Signatures

Signatures of Parties

(Seal)

(Seal)

(Seal)

(Seal)

STATE OF MARYLAND, CITY OF BALTIMORE, To Wit:

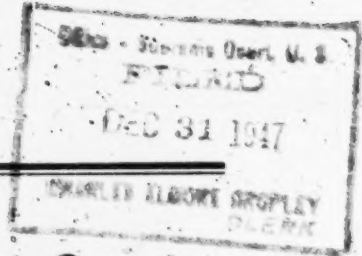
I hereby certify on this ..... day of .....  
in the year one thousand nine hundred and forty .....  
that before me, the subscriber, a Notary Public of the State  
of Maryland in and for the City of Baltimore aforesaid, per-  
sonally appeared .....

and they each acknowledged the foregoing deed and agree-  
ment to be their respective acts.

As witness my hand and notarial seal.

.....  
Notary Public.

Nos. 72, 87, 290, 291



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1947

J. D. SHELLEY, ET AL., *Petitioners*

v.

LOUIS KRAEMER, ET AL.

ORSEL MCGEE, ET AL., *Petitioners*

v.

BENJAMIN J. SIPES, ET AL.

JAMES M. HURD, ET AL., *Petitioners*

v.

FREDERICK E. HODGE, ET AL.

RAPHAEL G. URCILO, ET AL., *Petitioners*

v.

FREDERICK E. HODGE, ET AL.

**ON WRITS OF CERTIORARI TO THE SUPREME  
COURTS OF MISSOURI AND MICHIGAN AND THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA.**

**MOTION FOR LEAVE TO FILE AND BRIEF FOR THE  
AMERICAN FEDERATION OF LABOR AS  
AMICUS CURIAE.**

HERBERT S. THATCHER,  
ROBERT A. WILSON,

*Attorneys.*

*Of Counsel:*

HARRY B. MERICAN

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Nos. ~~73~~ 87, 290, 291

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**MOTION FOR LEAVE TO FILE AND BRIEF FOR THE  
AMERICAN FEDERATION OF LABOR AS  
AMICUS CURIAE.**

**Motion of the American Federation of Labor for Leave to  
File Brief as Amicus Curiae.**

The American Federation of Labor respectfully prays  
leave to file a brief as amicus curiae in the above-mentioned  
cases. The applicant has filed with the Clerk the written  
consent of counsel for petitioners and for respondents in

Nos. 290, 291 and No. 87. The applicant has in writing requested the consent of counsel for petitioners and for respondents in No. 72. No reply has as yet been received.

The American Federation of Labor (A. F. of L.) is an association of labor unions formed for the purpose of protecting and advancing the interests of workers in the United States. In 1947 its affiliated unions included 7,577,716 members.<sup>1</sup> Some 750,000 of these members were Negroes.

The interest of the A. F. of L. in the cases now before this Court is founded upon its desire to help in every possible way to secure for its members—and for all Americans—the opportunity to live in decent homes in physically and socially healthy surroundings. The judicial enforcement of racial restrictive covenants is one of the chief means by which its Negro members are confined to ghettos and prevented from competing in the open market for what little unoccupied dwelling space exists today. It is also the instrument which will negate, for our Negro members, full participation in any expansion of housing facilities in the United States which may be undertaken in the future. All that the A. F. of L. has accomplished in raising the income of Negro workers in the past—all that may be done in the future—is rendered virtually worthless when members cannot use their increased means to leave the ghettos and move to more congenial surroundings.

During its entire history, the A. F. of L. has fought for equal job rights and benefits for all its members, regardless of race, creed, or color. It has consistently opposed any discrimination against minority groups in the opportunity for obtaining jobs, in the wage rates paid on the job, or in the method of selection for advancement on the job. Its actions have been guided by the principle that the weakening of union standards to the detriment of any minority group

<sup>1</sup> American Federation of Labor Report of the Executive Council to the 66th Convention (1947), p. 10.

threatens the standards of the entire work force. Thus, in the view of the A. F. of L. the fight to eliminate discrimination in job opportunities, in wage standards, and likewise in the opportunity to obtain adequate housing facilities, has not been a fight for minority groups alone but for the entire laboring population of this country.

Evidence of this philosophy by the Federation abounds in the official reports of A. F. of L. activities. By convention action the A. F. of L. has placed itself on record, many times over, against all forms of discrimination based on race, creed, color or national origin. In its attempts to eliminate discrimination, the A. F. of L. has consistently declared its support of federal legislation to abolish the poll tax, to adopt a national anti-lynching bill and to establish a permanent Fair Employment Practices Commission.<sup>2</sup>

The Federation has also made every effort to secure passage of federal legislation to encourage construction of new housing which will be available to persons at the lower income levels. The Taft-Ellender-Wagner Bill has been supported by the A. F. of L. in the hope that it will help to solve the immediate problems of many American workmen.<sup>3</sup> Even if such a measure should be passed by the Congress, its effectiveness, so far as Negro members are concerned, will be made difficult so long as courts may enforce racial restrictive covenants. The great majority of Negroes in urban areas are either actual or potential union members.

## **BRIEF FOR THE AMERICAN FEDERATION OF LABOR AS AMICUS CURIAE.**

### **Question Presented**

Other briefs submitted in these cases discuss in considerable detail the legal and social problems involved. With the

<sup>2</sup> American Federation of Labor. "The American Federation of Labor Fights Discrimination." Pamphlet: American Federation of Labor. Report of Proceedings of 66th Convention (1947), pp. 629, 630, 652.

<sup>3</sup> American Federation of Labor. Report of the Executive Council to the 66th Convention, p. 127.

arguments advanced, particularly in the brief for petitioners, Nos. 290 and 291, the A. F. of L. is in full accord. We feel there is no need for repeating these arguments. In this brief, we wish to emphasize instead the effect which these racial restrictive covenants have had on the welfare and living standards of members of the American Federation of Labor.

### **SUMMARY OF ARGUMENT**

The American Federation of Labor will establish the fact that housing conditions for Negroes are inferior to those available for white persons largely because of the operation of racial restrictive covenants. It will further show the significance of this fact to Negroes and to the communities in which they live.

Data gathered by the Bureau of the Census support the conclusion that Negroes, more frequently than whites, live in substandard, overcrowded houses. Poverty of Negroes as a class is not the sole reason for this condition. Analysis of information contained in the 1940 U. S. Census establishes the fact that discrimination forces Negroes to accept inferior dwellings for the same rentals as paid by whites. Discrimination likewise forces Negro families to "double up" with other families to a greater degree than is necessary for white families. There is no immediate prospect that this situation will be remedied by new construction. Poor housing, aggravated by racial restrictive covenants, creates a breeding ground for juvenile delinquency.

Residential segregation is caused by poverty, ethnic attachment and discriminatory coercion. It has frequently been encountered in American cities where immigrants gather. But these people often choose segregation while they become familiar with the language and customs of the country. Later, they disperse. The Negro, as a result of discrimination, is a permanent alien. Informal social pres-



sure is an important weapon in the enforcement of segregation. Until this Court, in *Buchanan v. Worley*, 245 U.S. 60; *Harmon v. Tyler*, 273 U.S. 668, and *City of Richmond v. Deans*, 281 U.S. 704, found the practice unconstitutional, municipal zoning ordinances were used to support this informal coercion. After these cases were decided, persons interested in perpetuating residential segregation had recourse to the racial restrictive covenant, which performed all the functions of the outlawed zoning ordinances so long as they were enforced by the judiciary.

## ARGUMENT

### I. NEGROES OCCUPY POORLY EQUIPPED, RUN-DOWN AND OVERCROWDED DWELLINGS TO A GREATER DEGREE THAN DO WHITE PERSONS.

In the first place, consideration should be given to the actual conditions under which people live in the United States today, in a situation shaped to a considerable degree by racial restrictive covenants. In April, 1947, the Bureau of the Census, Department of Commerce, undertook a series of sample surveys in 34 metropolitan areas throughout the United States, and it has since issued Current Population Reports presenting data on population characteristics, housing and labor force. There is now in preparation a report on characteristics of occupied dwelling units by color of occupant.<sup>4</sup>

One table of the housing report on each area deals with characteristics of the dwelling units involved. There are, however, only 13 areas in which ordinary occupied dwelling units are classified according to the color of the occupants.<sup>5</sup>

<sup>4</sup> Current Population Reports. Housing Characteristics. Series P-70. No. 2.

<sup>5</sup> The Census Bureau distinguishes between "ordinary" and "other-than-ordinary" housing. The latter group includes trailer camps, tourist cabins, etc. Hotels, dormitories, rooming houses with 10 or more rooms, institutions, jails, and military or labor camps are not included in the survey. Current Population Reports. Housing. Series P-71, No. 35, p. 2.



But these reports relate to districts which, combined, house roughly one-quarter of the Nation's Negro population.

There are presented below tables summarizing salient features of the data on each of the metropolitan districts for which data for white persons and non-white persons were compiled separately.

### Washington, D. C.

At the time the survey—April, 1947—was made in the Washington, D. C., Metropolitan District, the population was estimated to be 919,232 white persons and 285,988 non-white persons.<sup>6</sup> At the same time, the area contained 275,388 ordinary dwelling units occupied by whites and 68,052 occupied by non-whites.

### CHARACTERISTICS OF ORDINARY DWELLING UNITS, BY COLOR OF OCCUPANTS, IN WASHINGTON, D. C.\*

	White	Non-white
Population .....	919,232	285,988
Per cent of total .....	76	24
Ordinary dwelling units .....	275,388	68,052
Per cent of total .....	80	20
Plumbing facilities and repair		
Total .....	100%	100%
Private bath and private flush toilet .....	95	71
Private flush toilet, no bath .....	1	6

\* Analysis of these figures shows clearly that greater proportions of the non-white population than of the white inhabitants lacked the conveniences of modern homes, lived in run-down dwelling units, occupied low-rent quarters, and lived in crowded units. This is generally typical of all cities studied. Comparison with data for the twelve other districts discloses that for white dwelling units Washington—with Philadelphia—had the greatest proportion of home units containing both a private bath and private flush toilet; complete electrification—with six other districts; and central heating—with Philadelphia; and the highest percentage of

<sup>1</sup> Less than 1 per cent.

Source: Current Population Reports, Housing, Series P-71, No. 1, p. 6.

<sup>6</sup> Current Population Reports, Population Characteristics, Series P-21, p. 2. It is estimated that this sample survey yields results which are accurate within a range of 6 per cent.

	White	Non-white
Running water, no private flush toilet .....	4	12
No running water .....	1	11
In need of major repair .....	2%	19%
Other facilities		
Cooking facilities .....	98%	92%
Electric lighting .....	100%	92%
Central heating .....	97%	70%
Number of persons per room		
Total .....	100%	100%
0.50 persons or less .....	30	18
0.51 to 1.50 persons .....	66	69
1.51 or more persons .....	4	12
Monthly rentals		
Total .....	100%	100%
Under \$10 .....	..	..
\$10 to \$19 .....	1	13
\$20 to \$29 .....	4	17
\$30 to \$39 .....	17	30
\$40 to \$49 .....	19	18
\$50 or more .....	59	23

### Baltimore, Maryland

The population of the Baltimore, Maryland, Metropolitan District consisted of 1,021,657 whites and 284,383 non-whites.<sup>7</sup> The area contained 291,387 ordinary dwelling units

units renting for \$50 or more. Its units occupied by whites had the smallest percentage with private flush toilet, but no private baths; of units with no running water—with four other areas; of units in need of major repairs—with Chicago; of units renting for less than \$10 monthly—with four other areas; of units renting from \$10-19; \$20-29; and \$30-39—with New Orleans. For non-white units, Washington had the largest percentage of units occupied by 0.51 to 1.50 persons per room; and of units renting for \$50 or more monthly; it had the smallest proportion of units renting for less than \$10; and from \$10-19. As between characteristics of white-occupied and non-white-occupied units in the same district, of all 19 districts Washington had the largest discrepancy between proportions of units renting for \$50 or more monthly and the least differences with regard to units renting for less than \$10—with Detroit; and units renting from \$40-49.

<sup>7</sup> Current Population Reports. Population Characteristics. Series P-21, No. 28, p. 5.

occupied by white persons and 63,139 occupied by non-white persons.

**CHARACTERISTICS OF ORDINARY DWELLING UNITS, BY  
COLOR OF OCCUPANTS, IN BALTIMORE, MD.\***

	White	Non-white
Population .....	1,021,657	284,383
Per cent of total .....	78	22
Ordinary dwelling units .....	291,387	63,139
Per cent of total .....	82	18
Plumbing facilities and repair		
Total .....	100%	100%
Private bath and private flush toilet .....	89	65
Private flush toilet, no bath .....	2	10
Running water, no private flush toilet .....	7	18
No running water .....	2	7
In need of major repair .....	4%	33%
Other facilities		
Cooking facilities .....	98%	88%
Electric lighting .....	100%	97%
Central heating .....	87%	46%
Number of persons per room		
Total .....	100%	100%
0.50 persons or less .....	38	24
0.51 to 1.50 persons .....	60	68
1.51 or more persons .....	2	8
Monthly rentals		
Total .....	100%	100%
Under \$10 .....	..	2
\$10 to \$19 .....	9	22
\$20 to \$29 .....	19	38
\$30 to \$39 .....	28	22
\$40 to \$49 .....	21	13
\$50 or more .....	22	4

Source: Current Population Reports. Housing.  
Series P-71, No. 28, p. 6.

\* Compared with the other cities covered in the survey, Baltimore was one of seven cities in which all units occupied by whites had electric lighting; and it was one of five cities in which there were no such units renting at under \$10 per month. It was also one of three cities which showed the greatest difference in proportions between units occupied by white and non-whites in regard to occupancy by 0.51 to 1.50 persons per room.

### Atlanta, Georgia

The population of the Atlanta, Georgia, Metropolitan District consisted of 355,224 white persons and 142,885 non-white persons.\* In this area there were 96,473 ordinary dwelling units occupied by whites and 40,426 occupied by non-whites.

#### CHARACTERISTICS OF ORDINARY DWELLING UNITS, BY COLOR OF OCCUPANTS, IN ATLANTA, GEORGIA.

	White	Non-white
Population .....	355,224	142,885
Per cent of total .....	71	29
Ordinary dwelling units .....	96,473	40,426
Per cent of total .....	70	30
Plumbing facilities and repair		
Total .....	100%	100%
Private bath and private flush toilet	82	43
Private flush toilet, no bath .....	3	15
Running water, no private flush toilet .....	10	14
No running water .....	6	28
In need of major repair .....	6%	28%
Other facilities		
Cooking facilities .....	99%	93%
Electric lighting .....	99%	77%
Central heating .....	54%	10%
Number of persons per room		
Total .....	100%	100%
0.50 persons or less .....	30	15
0.51 to 1.50 persons .....	64	65
1.51 or more persons .....	6	21

Source: Current Population Reports. Housing. Series P-71, No. 6, p. 6.

\* By comparison with the other cities surveyed by the Census Bureau, Atlanta—with five other cities—had the highest proportion of units occupied by white persons which had installed cooking facilities. It was one of four cities in which the proportion of non-white units occupied by 0.50 persons or less per room was lowest; and it was one of four cities in which there were no such units renting for \$50 or more per month. As regards the spread between proportions of units occupied by whites and non-whites, the largest difference in units occupied by 0.50 or less persons per room was found in this city.

\* Current Population Reports. Population Characteristics. Series P-21, No. 6, p. 5.

	White	Non-white
Monthly rentals		
Total .....	100%	100%
Under \$10 .....	5	23
\$10 to \$19 .....	21	58
\$20 to \$29 .....	21	13
\$30 to \$39 .....	22	4
\$40 to \$49 .....	15	1
\$50 or more .....	16	..

### Birmingham, Alabama

The population of Birmingham, Alabama, Metropolitan District consisted of 292,638 white persons and 209,760 non-white persons.<sup>9</sup> There were 80,902 ordinary dwelling units in this area occupied by whites and 54,454 occupied by non-whites.

#### CHARACTERISTICS OF ORDINARY DWELLING UNITS, BY COLOR OF OCCUPANTS, IN BIRMINGHAM, ALA.\*

	White	Non-white
Population .....	292,638	209,760
Per cent of total .....	58	42
Ordinary dwelling units .....	80,902	54,454
Per cent of total .....	60	40
Plumbing facilities and repair		
Total .....	100%	100%
Private bath and private flush toilet	78	17
Private flush toilet, no bath .....	2	25

Source: Current Population Reports. Housing. Series P-71, No. 32, p. 6.

\* Comparison with data for the other cities included in the survey shows that, with regard to the dwelling units occupied by whites, Birmingham had the largest proportion of units having running water, but no private bath; it had—with five other cities—the largest proportion of units containing installed cooking facilities; and the largest percentage of units renting for less than \$10 per month. It had the lowest percentage in the following respects: units with private bath and private flush toilet; and units renting for \$50 or more per month. In regard to dwelling units occupied by non-whites, it showed the highest proportions in the following respects: units having no running water—with Memphis;

<sup>9</sup> Current Population Reports. Population Characteristics. Series P-21, No. 32, p. 5.



	White	Non-white
Running water, no private flush toilet .....	15	27
No running water .....	5	30
In need of major repair .....	8%	30%
Other facilities		
Cooking facilities .....	99%	94%
Electric lighting .....	99%	89%
Central heating .....	43%	4%
Number of persons per room		
Total .....	100%	100%
0.50 persons or less .....	28	17
0.51 to 1.50 persons .....	66	58
1.51 or more persons .....	6	25
Monthly rentals		
Total .....	100%	100%
Under \$10 .....	6	47
\$10 to \$19 .....	26	48
\$20 to \$29 .....	27	5
\$30 to \$39 .....	19	1
\$40 to \$49 .....	12	..
\$50 or more .....	9	..

### Chicago, Illinois

The population of the Chicago, Illinois, Metropolitan District was composed of 4,197,270 white persons and 447,370 non-white persons.<sup>10</sup> There were 1,222,760 ordinary dwelling units in this area occupied by whites and 111,265 occupied by non-whites.

units occupied by 1.51 persons or more per room; units renting for less than \$10 per month. It had the lowest percentage in the following respects: units having both private bath and private flush toilet; units renting at \$20-29 per month; at \$30-39; at \$40-49—with two other cities; and at \$50 or more—with three other cities. It showed the widest differences in proportion between whites and non-whites in the following respects: units having private bath and private flush toilet; units having no running water; units occupied by 0.51 to 1.50 persons per room—with two other cities; units occupied by 1.51 or more persons per room; and units renting for \$10 or less per month. In no case did it present the minimum gap.

<sup>10</sup> Current Population Reports. Population Characteristics. Series P-21, No. 29, p. 5.

# CHARACTERISTICS OF ORDINARY DWELLING UNITS, BY COLOR OF OCCUPANTS, IN CHICAGO, ILL.\*

	White	Non-white
Population .....	4,197,270	447,370
Per cent of total .....	90	10
Ordinary dwelling units .....	1,222,760	111,265
Per cent of total .....	92	8
<b>Plumbing facilities and repair</b>		
Total ..	100%	100%
Private bath and private flush toilet	92	78
Private flush toilet, no bath .....	2	4
Running water, no private flush toilet .....	5	12
No running water .....	1	6
In need of major repair .....	2%	12%
<b>Other facilities</b>		
Cooking facilities .....	99%	96%
Electric lighting .....	100%	100%
Central heating .....	82%	72%
<b>Number of persons per room</b>		
Total .....	100%	100%
0.50 persons or less .....	38	25
0.51 to 1.50 persons .....	60	62
1.51 or more persons .....	2	13

Source: Current Population Reports, Housing.  
Series P-71, No. 29, p. 3.

\* Comparison with data for the other cities surveyed shows that with regard to dwelling units occupied by whites, Chicago had the highest percentage in the following respects: units having installed cooking facilities—with five other cities; electric lighting in all units—with six other cities; units renting for from \$40-49 monthly. It had the lowest proportions in the following respects: units having no running water—with four other cities; and in units requiring major repairs—with Washington. With regard to dwelling units occupied by non-whites, it had the highest percentages in the following categories: electric lighting in all units—with Detroit; and units renting from \$40-49 per month. It had the lowest proportions in the following respects: units having private flush toilets but no private bath—with Philadelphia; units in need of major repairs; units renting under \$10 per month—with two other cities. It showed the smallest differences in proportions between white and non-whites in the following respects: units with electric lighting—with Detroit; units renting at \$10-19 monthly; \$20-29; \$30-39; and \$50 or more. As these latter figures show, Chicago shows the least differentiation in distribution of dwelling units so far as rentals are concerned.

	White	Non-white
Monthly rentals		
Total .....	100%	100%
Under \$10 .....	1	1
\$10 to \$19 .....	11	15
\$20 to \$29 .....	17	18
\$30 to \$39 .....	24	20
\$40 to \$49 .....	28	24
\$50 or more .....	20	22

### Dallas, Texas

The population of the Dallas, Texas, Metropolitan District consisted of 399,344 white persons and 70,708 non-white persons.<sup>11</sup> There were 123,068 ordinary dwelling units in the area occupied by whites and 21,208 occupied by non-whites.

### CHARACTERISTICS OF ORDINARY DWELLING UNITS, BY COLOR OF OCCUPANTS, IN DALLAS, TEXAS.\*

	White	Non-white
Population .....	399,344	70,708
Per cent of total .....	85	15
Ordinary dwelling units .....	123,068	21,208
Per cent of total .....	85	15
Plumbing facilities and repair		
Total .....	100%	100%
Private bath and private flush toilet	86	55
Private flush toilet, no bath .....	1	13

Source: Current Population Reports. Housing.  
Series P-71, No. 34, p. 6.

\* Comparison with data for the other cities surveyed shows that with regard to dwelling units, occupied by whites, Dallas—with St. Louis—had the highest percentage of units in need of major repairs. It had the lowest percentage with respect to units equipped with installed cooking facilities; and with central heating. With regard to dwelling units occupied by non-whites, it had the lowest percentage of units equipped with central heating—with New Orleans; and of units renting for \$50 or more monthly—with three other cities. It showed the smallest difference in proportion between white and non-white units with respect to equipment with central heating.

<sup>11</sup> Current Population Reports. Population Characteristics. Series P-21, No. 34, p. 5.

	White	Non-white
Running water, no private flush toilet .....	7	9
No running water .....	7	22
In need of major repair .....	9%	34%
Other facilities		
Cooking facilities .....	97%	90%
Electric lighting .....	99%	93%
Central heating .....	4%	1%
Number of persons per room		
Total .....	100%	100%
0.50 persons or less .....	34	23
0.51 to 1.50 persons .....	59	62
1.51 or more persons .....	7	15
Monthly rentals		
Total .....	100%	100%
Under \$10 .....	2	5
\$10 to \$19 .....	14	47
\$20 to \$29 .....	25	35
\$30 to \$39 .....	30	10
\$40 to \$49 .....	17	2
\$50 or more .....	12	..

### Detroit, Michigan

The population of the Detroit, Michigan, Metropolitan District was composed of 2,354,153 whites and 348,245 non-white persons.<sup>12</sup> There were 666,796 ordinary dwelling units occupied by whites and 83,386 units by non-whites.

### CHARACTERISTICS OF ORDINARY DWELLING-UNITS, BY COLOR OF OCCUPANTS, IN DETROIT, MICH.\*

	White	Non-white
Population .....	2,354,153	348,245
Per cent of total .....	87	13
Ordinary dwelling units .....	666,796	83,386

Source: Current Population Reports, Housing. Series P-71, No. 19, p. 6.

\* By comparison with data for other cities, with regard to dwelling units occupied by whites, Detroit had the highest percentages with

<sup>12</sup> Current Population Reports. Population Characteristics. Series P-21, No. 19, p. 5.

	White	Non-white
Per cent of total .....	89	11
Plumbing facilities and repair		
Total .....	100%	100%
Private bath and private flush toilet	93	84
Private flush toilet, no bath .....	1	8
Running water, no private flush toilet .....	4	7
No running water .....	1	2
In need of major repair .....	3%	25%
Other facilities		
Cooking facilities .....	99%	99%
Electric lighting .....	100%	100%
Central heating .....	87%	58%
Number of persons per room		
Total .....	100%	100%
0.50 persons or less .....	35	30
0.51 to 1.50 persons .....	63	63
1.51 or more persons .....	2	7
Monthly rentals		
Total .....	100%	100%
Under \$10 .....	..	..
\$10 to \$19 .....	3	9
\$20 to \$29 .....	17	33
\$30 to \$39 .....	35	41
\$40 to \$49 .....	27	14
\$50 or more .....	17	3

respect to the following factors: units equipped with installed cooking facilities—with five cities; units with electric lighting—with six cities. It had the lowest percentages with respect to units having no running water—with four cities; and units renting for under \$10 monthly—with four cities. With regard to dwelling units occupied by non-whites, it had the highest percentage with respect to the following factors: units with private bath and private flush toilet; units with installed cooking facilities; units with electric lighting—with Chicago; and units with monthly rentals of \$30-39. It had the lowest percentages for the following factors: units having running water, but no private flush toilet; units having no running water—with Philadelphia; units occupied by 1.51 or more persons per room—with Philadelphia; and units with rentals under \$10 per month. It showed the smallest difference in proportions between white and non-white units with respect to: units with private bath and private flush toilet; units having no running water—with Philadelphia; units with installed cooking facilities; units with electric lighting—with Chicago; units with 0.50 or less persons per room—with Philadelphia; and units renting for under \$10 monthly—with Washington.



### Memphis, Tennessee

The population of the Memphis, Tennessee, Metropolitan District consisted of 239,010 white persons and 163,742 non-whites.<sup>13</sup> This area contained 66,123 ordinary dwelling units occupied by white persons and 45,260 occupied by non-white persons.

#### CHARACTERISTICS OF ORDINARY DWELLING UNITS, BY COLOR OF OCCUPANTS, IN MEMPHIS, TENN.\*

	White	Non-white
Population .....	239,010	163,742
Per cent of total .....	59	41
Ordinary dwelling units .....	66,123	45,260
Per cent of total .....	59	41
Plumbing facilities and repair		
Total .....	100%	100%
Private bath and private flush toilet .....	80	30
Private flush toilet, no bath .....	2	28
Running water, no private flush toilet .....	11	12
No running water .....	6	30
In need of major repair .....	4%	19%

Source: Current Population Reports. Housing. Series P-71, No. 14, p. 6.

\* Comparison with the data for the other cities surveyed reveals that with regard to dwelling units occupied by whites, Memphis—with Norfolk-Portsmouth-Newport News—had the highest proportion of units occupied by 0.51 to 1.50 persons per room; and of units occupied by 0.50 or less persons per room. With regard to dwelling units occupied by non-whites, it had the highest percentage of units with private flush toilet, but no bath; and—with Birmingham—of units with no running water. It had the lowest percentage in the following categories: units with electric lighting; units occupied by 0.50 or less persons per room—with two cities; and units renting for \$50 or more per room—with three cities. It showed the greatest differences between proportions of units occupied by whites and non-whites in the following categories: units with private flush toilet, but no private bath; units with electric lighting; and units renting from \$40-49 monthly. It showed the smallest difference in proportion of white and non-white units having running water, but no private flush toilet—with Tulsa.

<sup>13</sup> Current Population Reports. Population Characteristics. Series P-21, No. 14, p. 5.

	White	Non-white
<b>Other facilities</b>		
Cooking facilities .....	98%	94%
Electric lighting .....	99%	76%
Central heating .....	46%	4%
<b>Number of persons per room</b>		
Total .....	100%	100%
0.50 persons or less .....	24	15
0.51 to 1.50 persons .....	67	61
1.51 or more persons .....	9	24
<b>Monthly rentals</b>		
Total .....	100%	100%
Under \$10 .....	2	32
\$10 to \$19 .....	12	52
\$20 to \$29 .....	24	10
\$30 to \$39 .....	23	4
\$40 to \$49 .....	19	1
\$50 or more .....	20	..

### New Orleans, Louisiana

The population of New Orleans, Louisiana, Metropolitan District was composed of 434,784 white persons and 166,824 non-white persons.<sup>14</sup> This area contained 122,976 ordinary dwelling units occupied by white persons and 44,464 occupied by non-white persons.

### CHARACTERISTICS OF ORDINARY DWELLING UNITS, BY COLOR OF OCCUPANTS, IN NEW ORLEANS, LA.

	White	Non-white
Population .....	434,784	166,824
Per cent of total .....	72	28

Source: Current Population Reports. Housing. Series P-71, No. 31, p. 6.

\* Comparison with the data for the other cities surveyed reveals that New Orleans, with regard to dwelling units occupied by whites, has the highest proportion of units renting at from \$10-19 per month, and the lowest percentages of: units with no running water—with four cities; units renting at from \$30-39—with Washington; and units renting from \$40-49. With regard to dwelling units occupied by Negroes, it had

<sup>14</sup> Current Population Reports. Population Characteristics. Series P-21, No. 31, p. 5.

	White	Non-white
Ordinary dwelling units .....	122,976	44,464
Per cent of total .....	73	27
Plumbing facilities and repair		
Total .....	100%	100%
Private bath and private flush toilet	93	53
Private flush toilet, no bath .....	1	19
Running water, no private flush toilet .....	5	12
No running water .....	1	16
In need of major repair .....	7%	42%
Other facilities		
Cooking facilities .....	98%	85%
Electric lighting .....	99%	82%
Central heating .....	15%	1%
Number of persons per room		
Total .....	100%	100%
Under \$10 .....	2	20
\$10 to \$19 .....	29	61
\$20 to \$29 .....	27	16
\$30 to \$39 .....	17	2
\$40 to \$49 .....	11	..
\$50 or more .....	13	1

### Norfolk—Portsmouth—Newport News, Virginia

The Bureau of the Census combined Norfolk, Portsmouth and Newport News, Virginia, into a single Metropolitan District for the purposes of this survey. The population of these communities consisted of 329,376 white persons and 141,658 non-white persons.<sup>15</sup> The area contained 95,974 ordinary dwelling units occupied by whites and 37,318 occupied by non-whites.

the highest proportion of units needing major repairs; and of units renting at from \$10-19 monthly. It had the lowest percentage of units with installed cooking facilities; units with central heating—with Dallas; and units with monthly rentals of \$40-49. It showed the greatest differences in proportions of units occupied by whites and non-whites with respect to units needing major repairs; and units with installed cooking facilities.

<sup>15</sup> Current Population Reports. Population Characteristics. Series P-21, No. 13, p. 5.

CHARACTERISTICS OF ORDINARY DWELLING UNITS, BY  
COLOR OF OCCUPANTS, IN NORFOLK, PORTS-  
MOUTH AND NEWPORT NEWS, VA.\*

	White	Non-white
Population .....	329,376	141,658
Per cent of total .....	70	30
Ordinary dwelling units .....	95,974	37,318
Per cent of total .....	72	28
Plumbing facilities and repair		
Total .....	100%	100%
Private bath and private flush toilet	94	44
Private flush toilet, no bath .....	1	24
Running water, no private flush toilet .....	4	17
No running water .....	2	15
In need of major repair .....	4%	23%
Other facilities		
Cooking facilities .....	98%	93%
Electric lighting .....	100%	88%
Central heating .....	51%	5%
Number of persons per room		
Total .....	100%	100%
0.50 persons or less .....	31	27
0.51 to 1.50 persons .....	67	62
1.51 or more persons .....	2	11
Monthly rentals		
Total .....	100%	100%
Under \$10 .....		11
\$10 to \$19 .....	6	48
\$20 to \$29 .....	16	28
\$30 to \$39 .....	46	11
\$40 to \$49 .....	16	1
\$50 or more .....	16	1

Source: Current Population Reports. Housing.  
Series P-71, No. 13, p. 6.

\* Comparison with the data for the other cities surveyed discloses that the tri-cities, with regard to dwelling units occupied by whites, had the largest percentages with respect to the following factors: units with electric lighting—with six cities; units containing 0.51 to 1.50 persons per room—with Memphis; and units with monthly rentals of \$30-39. They had the smallest proportion of units with rentals of under \$10—with four cities. With regard to dwelling units occupied by non-whites they had the lowest proportion—with two cities—of units renting for \$30-39 monthly. They showed the greatest differences in proportion of units occupied by whites and non-whites with respect to units with central heating; and units with monthly rentals of \$30-39; and the least difference with respect to units containing 0.50 or less persons per room.

<sup>1</sup> Less than 1 per cent.

### Philadelphia, Pennsylvania

The population of the Philadelphia, Pennsylvania, Metropolitan District was composed of 2,933,280 white persons and 439,410 non-white persons.<sup>16</sup> This region contained 826,149 ordinary dwelling units occupied by whites and 112,908 occupied by non-whites.

#### CHARACTERISTICS OF ORDINARY DWELLING UNITS, BY COLOR OF OCCUPANTS, IN PHILADELPHIA, PA.\*

	White	Non-white
Population .....	2,933,280	439,410
Per cent of total .....	87	13
Ordinary dwelling units .....	826,149	112,908
Per cent of total .....	88	12
Plumbing facilities and repair		
Total .....	100%	100%
Private bath and private flush toilet	95	79
Private flush toilet, no bath .....	1	4

Source: Current Population Reports. Housing. Series P-71, No. 12, p. 6.

\* Comparison with the data for two other cities included in the survey discloses that Philadelphia, with regard to dwelling units occupied by whites, had the highest proportions in the following respects: units having both a private bath and a private flush toilet—with Washington; units containing installed cooking facilities—with five cities; units with electric lighting—with five cities; units with central heating—with Washington; and units with 0.50 or less persons per room. It had the lowest percentages with respect to the following factors: units having running water, but no private flush toilet; units having no running water—with four cities; units containing 0.51 to 1.50 persons per room; units with 1.51 or more persons per room; and units with monthly rentals under \$10—with four cities. With regard to dwelling units occupied by non-whites, it had the highest proportions of the following factors: units with central heating; units with 0.50 or less persons per room; and units with monthly rentals of \$20-29. It had the smallest proportions with respect to units having a private flush toilet, but no private bath—with Chicago; units having no running water—with Detroit; units with 0.51 to 1.50 persons per room; and units with 1.51 or more persons per room—with Detroit. It showed the greatest difference in proportion of units occupied by whites and non-whites with respect to units renting at \$20-29 monthly and the least differences with respect to the following factors: units with private flush toilet, but no private bath; units with no running water—with Detroit; units with 0.50 to 1.50 persons per room—with Detroit; and units with 1.51 or more persons per room.

<sup>16</sup> Current Population Reports. Population Characteristics. Series P-21, No. 12, p. 5.



	White	Non-white
Running water, no private flush toilet .....	3	15
No running water .....	1	2
In need of major repair .....	4%	24%
Other facilities		
Cooking facilities .....	99%	93%
Electric lighting .....	100%	97%
Central heating .....	97%	73%
Number of persons per room		
Total .....	100%	100%
0.50 persons or less .....	43	36
0.51 to 1.50 persons .....	56	56
1.51 or more persons .....	1	7
Monthly rentals		
Total .....	100%	100%
Under \$10 .....	1	2
\$10 to \$19 .....	12	22
\$20 to \$29 .....	26	55
\$30 to \$39 .....	30	16
\$40 to \$49 .....	17	4
\$50 or more .....	15	1

<sup>1</sup> Less than 1 per cent.

### St. Louis, Missouri

The population of the St. Louis, Missouri, Metropolitan District was composed of 1,344,574 white persons and 239,470 non-white persons.<sup>17</sup> There were 394,856 ordinary dwelling units occupied by whites and 66,990 occupied by non-whites.

<sup>17</sup> Current Population Reports. Population Characteristics. Series P-21; No. 15, p. 5.

# CHARACTERISTICS OF ORDINARY DWELLING UNITS, BY COLOR OF OCCUPANTS, IN ST. LOUIS, MISSOURI.\*

	White	Non-white
Population .....	1,344,574	239,470
Per cent of total .....	85	15
Ordinary dwelling units .....	394,856	66,990
Per cent of total .....	85	15
Plumbing facilities and repair		
Total .....	100%	100%
Private bath and private flush toilet .....	83	35
Private flush toilet, no bath .....	4	16
Running water, no private flush toilet .....	10	37
No running water .....	3	11
In need of major repair .....	9%	32%
Other facilities		
Cooking facilities .....	99%	96%
Electric lighting .....	100%	97%
Central heating .....	75%	30%
Number of persons per room		
Total .....	100%	100%
0.50 persons or less .....	29	15
0.51 to 1.50 persons .....	66	62
1.51 or more persons .....	5	23
Monthly rentals		
Total .....	100%	100%
Under \$10 .....	5	7
\$10 to \$19 .....	27	55
\$20 to \$29 .....	26	24
\$30 to \$39 .....	19	12
\$40 to \$49 .....	12	2
\$50 or more .....	12	1

Source: Current Population Reports. Housing. Series P-71, No. 15, p. 6.

\* Comparison with the data for the other cities included in the survey discloses that with respect to dwelling units occupied by whites, St. Louis had the highest proportions in the following respects: units in need of major repairs—with Dallas; units with installed cooking facilities—with five cities; units with electric lighting—with six cities. With respect to dwelling units occupied by non-whites, it had the highest percentage of units with running water, but no private flush toilet; and the lowest percentage of units with 0.50 or less persons per room. It also had the greatest difference in proportions between white and non-white units with running water, but no private flush toilet.

### Tulsa, Oklahoma

The population of Tulsa, Oklahoma, Metropolitan District was composed of 190,953 white persons and 22,323 non-white persons.<sup>18</sup> There were 58,695 ordinary dwelling units occupied by whites and 6,153 occupied by non-whites.

#### CHARACTERISTICS OF ORDINARY DWELLING UNITS, BY COLOR OF OCCUPANTS, IN TULSA, OKLAHOMA.\*

	White	Non-white
Population .....	190,953	22,323
Per cent of total .....	90	10
Ordinary dwelling units .....	58,695	6,153
Per cent of total .....	90	10
Plumbing facilities and repair		
Total .....	100%	100%
Private bath and private flush toilet	79	57
Private flush toilet, no bath .....	2	6
Running water, no private flush toilet .....	11	12
No running water .....	8	25
In need of major repair .....	6%	13%
Other facilities		
Cooking facilities .....	98%	94%
Electric lighting .....	98%	93%
Central heating .....	38%	11%
Number of persons per room		
Total .....	100%	100%
0.50 persons or less .....	33	29

Source: Current Population Reports. Housing.  
Series P-71, No. 33, p. 6.

\* Comparison with the data of the other cities included in the survey indicates that with respect to dwelling units occupied by whites, Tulsa had the highest percentages of units with no running water; and with monthly rentals of \$20-29; and the smallest percentage of units with electric lighting. It also had the greatest difference in proportions between white and non-white units with 0.51 to 1.50 per persons per room—with two cities; and units with monthly rentals of \$10-19. It had the least differences in proportions with respect to units with running water but no private flush toilet—with Memphis; units in need of major repairs; and units with 0.50 or less persons per room—with Norfolk, Portsmouth, Newport News.

<sup>18</sup> Current Population Reports. Population Characteristics. Series P-21, No. 33, p. 5.

	White	Non-white
0.51 to 1.50 persons .....	66	58
1.51 or more persons .....	7	14
<b>Monthly rentals</b>		
Total .....	100%	100%
Under \$10 .....	2	6
\$10 to \$19 .....	12	57
\$20 to \$29 .....	31	28
\$30 to \$39 .....	30	7
\$40 to \$49 .....	15	2
\$50 or more .....	10	1

The reports of the Bureau of the Census summarized above show convincingly that non-whites in the United States—and they are predominantly Negroes—live in poorer dwellings than whites. A greater proportion of non-white persons occupying ordinary dwelling units live in homes with limited—or no—plumbing facilities than do white people; their homes are relatively less frequently equipped with installed cooking facilities, electric lighting and central heating; their residences are comparatively more often in need of major repairs; they are more frequently overcrowded; and their dwelling units are comparatively less frequently found among the better residences, as indicated by rents.

## II. THESE CONDITIONS REFLECT THE EFFECT OF RACIAL RESTRICTIVE COVENANTS AS WELL AS POVERTY.

The stock answer of those who support racial restrictive covenants to the facts set forth above is that they reflect merely the lower income level of Negroes. But this assertion is contrary to the facts. In addition to poverty, there is no doubt that racial discrimination—and racial restrictive covenants, as a manifestation thereof—plays an important part in forcing Negroes into inferior housing.

This has been proved by C. K. Robinson, Housing Analyst of the National Housing Administration, who studied data collected in the 1940 Federal Census for the purpose



of discovering how far ability to pay (i.e., income level) affected the kind of home which a non-white person could occupy.<sup>19</sup> The data analyzed related to 6,365,845 dwelling units occupied by white families and 850,063 units occupied by non-white families in sixteen northern and western cities and twenty-six southern principal metropolitan districts. It was found that in these localities there were 1,229,883 substandard units occupied by white families, or 19.37 per cent of all units with white occupancy, and 494,990 substandard units occupied by non-white families, or 58.2 per cent of all units with non-white occupancy.<sup>20</sup>

The following table summarizes the findings of the analyst with regard to the percentage of dwelling units at specified rent levels which were substandard, classified by the race of the occupant. The ratio of the proportion of non-white units to the proportion of white units at the same rent scale is also shown.

**PROPORTION OF WHITE AND NON-WHITE DWELLING  
UNITS WHICH WERE SUBSTANDARD BY  
RENTAL LEVELS.\***

Monthly Rental Level	Proportion Substandard (%)		Ratio of Non-White to White (Proportion)
	White	Non-White	
Under \$ 5	90.2	97.6	1.1
5-9	87.7	94.1	1.1
10-14	69.4	79.4	1.1
15-19	42.1	55.3	1.3
25-29	14.4	31.0	1.8
30-39	7.7	20.9	2.2
40-49	4.0	13.5	3.4
50-59	3.2	10.9	3.4
60-74	2.8	9.1	3.3
75-99	2.7	10.7	3.9
100 and over	2.8	13.4	4.8

\* Robinson, op. cit. p. 297.

<sup>19</sup> C. K. Robinson, "Relationship Between Condition of Dwellings and Rentals by Race," 22 Journal of Land and Public Utility Economics 296 (August, 1924).

<sup>20</sup> Robinson, op. cit. p. 298. "Substandard units" were those which lacked either a private flush toilet, a private bath, or running water, or which were in need of major repairs.



The assumption underlying the analysis was that: "If there were no racial factors operating to limit the supply of housing available to Negroes, the units they occupy, distributed by rental groups, would generally tend to fall into the same classification, by state of repair and plumbing, as those occupied by white households.<sup>21</sup> The study proves conclusively that this is not the case.

The conclusions drawn by the analyst from this study, so far as they are relevant to the subject matter of this brief, are: (1) the non-white group receives more substandard housing for the same price, even at the lowest rental level, where one would expect only poverty to operate as a factor, than does the white group; (2) the progressive increase in the ratio of non-white to white occupancy in substandard housing in each successive rental bracket from the lowest to the highest—with one slight exception—clearly indicates existence of discrimination, independent of ability to pay rent.<sup>22</sup>

The above table shows that cost is obviously no factor in determining whether or not a Negro will live in a properly equipped home in good repair, since even at \$100 or more per month there is an appreciable chance that the tenant will live in a substandard dwelling. In fact, the chances are almost as great for a Negro seeking a home which rents for \$100 or more per month as for a white person seeking a home at the \$25-\$29 level. It would be foolish to suppose that Negroes would deliberately choose substandard housing. And the consistency with which the proportion of non-whites in substandard dwellings exceeds those of whites, at every rent level, is a definite indication that this situation is not accidental. If these elements do

<sup>21</sup> Robinson, op. cit. p. 301.

<sup>22</sup> Robinson, op. cit. p. 301; Shuman, "Differential Rents for White and Negro Families," 3 Journal of Housing 169; Council of Social Agencies of the District of Columbia and Vicinity; The Social Survey, a Report on Racial Relations (Nov. 1946) pp. II-C-9,11.

not provide an explanation of the condition reflected by Robinson's data, discrimination does. And housing segregation, implemented by racial restrictive covenants, serves as a foundation of that discrimination.<sup>23</sup>

### III. CONGESTION IS AGGRAVATED AND PERPETUATED BY RACIAL RESTRICTIVE COVENANTS.

These figures are only a reflection of the fact that racial restrictive covenants narrow the available market for Negroes seeking dwellings.<sup>24</sup> Unable to find unoccupied units, they are forced to "double up," causing congestion and leading inevitably to blighted areas and juvenile delinquency.<sup>25</sup> Data gathered by the Bureau of the Census and the Bureau of Labor Statistics from July, 1946, through January, 1947, show the extent of this practice among white and Negro families.

#### "DOUBLING UP" IN ORDINARY DWELLING UNITS OCCUPIED BY NEGRO AND WHITE FAMILIES, JULY, 1946, THROUGH JANUARY, 1947.

##### Occupied by Whites - Occupied by Negroes

Community	Total Dwelling Units	Pctg. "Doubled Up"	Total Dwelling Units	Pctg. "Doubled Up"
Washington, D. C. ....	252,450	7	59,760	21
Baltimore, Md. ....	205,800	8	44,415	20
Chattanooga, Tenn. ....	26,865	11	9,970	11
Austin, Tex. ....	22,632	10	3,472	8
Baton Rouge, La. ....	16,170	9 <sup>0</sup>	8,406	11
Waco, Tex. ....	14,340	6	3,472	8
Columbia, S. C. ....	12,425	13	5,489	9
Raleigh, N. C. ....	9,462	14	3,476	14
Louisville, Ky. ....	104,055	9	14,760	12
Memphis, Tenn. ....	56,544	14	35,748	9

<sup>23</sup> G. Myrdal, "An American Dilemma" (New York, 1944), p. 379.

<sup>24</sup> Robinson, op. cit. p. 296.

<sup>25</sup> The Bureau of the Census defined as "doubled up" a person living in a dwelling unit which contained more than one family, i.e., the unit contained in addition to the head of the household, married couples or married women with husbands absent.

Community	Occupied by Negroes		Occupied by Whites	
	Total Dwelling Units	Pctg. "Doubled Up"	Total Dwelling Units	Pctg. "Doubled Up"
Jackson, Miss.	10,934	17	5,976	16
Greensboro, N. C.	11,880	16	3,960	17
Charlotte, N. C.	18,886	13	7,976	9
Beaumont-Pt. Arthur, Tex.	25,662	8	8,883	11
Asheville, N. C.	10,374	10	3,451	13
Birmingham, Ala.	55,496	10	34,335	11
Montgomery, Ala.	12,857	12	11,868	9
Ft. Worth, Tex.	52,417	9	8,838	53
Houston, Tex.	103,055	10	24,600	13
Roanoke, Va.	17,892	14	2,976	4
Atlanta, Ga.	73,725	13	32,868	15
New Orleans, La.	107,470	14	44,775	15
Shreveport, La.	21,736	9	10,934	9

Source: Bureau of the Census, Department of Commerce, and the Bureau of Labor Statistics, Department of Labor, Veterans Housing Survey: Population, H. Vet. Nos. 84, 58, 97, 102, 100, 99, 101, 85, 69, 74, 65, 63, 64, 66, 70, 73, 78, 79, 75, 82, 68.

The range of degrees of "doubling up" among Negro families for the communities listed is from 4 to 53 per cent and the median is 11 per cent—a substantial figure, particularly in view of the fact that all the large cities included are at the median or above. The range for whites is from 6 to 17 per cent and the median is 10. This is no temporary condition. The Bureau of Labor Statistics, Construction Statistics Division, has gathered unpublished data which indicates that between December, 1946, and June, 1947, building operations were started on an infinitesimal number of dwelling units for Negro occupancy by comparison with those started on units for white occupancy. While the figures were derived from studies in selected cities and only in the specified months, they serve as an adequate indication of comparative activity. So long as demand for housing by white persons is active, it is obvious that little building for Negro occupancy will be



**PERCENT OF NON-WHITE POPULATION, NUMBER AND PERCENTAGE DISTRIBUTION OF DWELLING  
UNITS STARTED, BY RACE OF OCCUPANTS IN SELECTED INDUSTRIAL AND URBAN AREAS  
DECEMBER, 1946-JUNE, 1947**

Area	Percentage non-white population <sup>1</sup>	Number	Total Per cent	Dwelling Units Started <sup>2</sup> White <sup>3</sup>		Negro	
				Number	Per cent	Number	Per cent
December 1946							
Pittsburgh, Pa. ....	6	372	100.0	368	98.9	4	1.1
Columbus, Ohio .....	9	141	100.0	131	92.9	10	7.1
Minneapolis, Minn. ....	1	410	100.0	410	100.0	0	0.0
January 1947							
Atlanta, Ga. ....	29	365	100.0	351	96.2	14	3.8
Boston, Mass. ....	2	246	100.0	246	100.0	0	0.0
Chicago, Ill. ....	10	719	100.0	719	100.0	0	0.0
Dallas, Tex. ....	15	338	100.0	325	97.6	8	2.4
Denver, Colo. ....	4	274	100.0	274	100.0	0	0.0
New York, Newark, Jersey City .....	8	2,863	100.0	2,863	100.0	0	0.0
San Francisco Bay Area, Calif. ....	5	1,567	100.0	1,567	100.0	0	0.0
Seattle-Tacoma, Wash.:							
Seattle .....	4	376	100.0	376	100.0	0	0.0
Tacoma .....	1.7*						
St. Louis, Mo. ....	15	320	100.0	312	97.5	8	2.5
Washington, D. C. ....	24	719	100.0	696	96.8	23	3.2
Mobile Co., Ala. ....	27.6*	62	100.0	45	72.6	17	27.5
February 1947							
Detroit, Mich. ....	13	812	100.0	812	100.0	0	0.0
Philadelphia, Pa.-Camden, N. J. ....	13	372	100.0	372	100.0	0	0.0
Los Angeles, Calif. ....	6	5,675	100.0	5,667	99.9	8	.1
Memphis, Tenn. ....	41	476	100.0	344	82.7	72	17.3

Area	Percentage non-white population <sup>1</sup>	Number	Total Per cent	Dwelling Units Started <sup>2</sup> White <sup>3</sup>		Negro	
				Number	Per cent	Number	Per cent
March 1947							
Columbus, Ohio .....	9	274	100.0	274	100.0	0	0.0
Minneapolis, Minn. ....	1	194	100.0	194	100.0	0	0.0
Pittsburgh, Pa. ....	6	453	100.0	453	100.0	0	0.0
Sacramento, Calif. ....	5.8†	317	100.0	317	100.0	0	0.0
May 1947							
Detroit, Mich. ....	13	1,528	100.0	1,528	100.0	0	0.0
Los Angeles, Calif. ....	6	2,582	100.0	2,582	100.0	0	0.0
Philadelphia, Pa.-Camden, N. J. ....	13	1,481	100.0	1,481	100.0	0	0.0
Toledo, Ohio .....	5	104	100.0	102	98.1	2	1.9
June 1947							
Columbus, Ohio ..	9	174	100.0	165	94.8	9	5.2
Sacramento, Calif. ....	5.8†	183	100.0	283	100.0	0	0.0

<sup>1</sup> Source: Current Population Reports, Population Characteristics Series, Series P. 21, April 1947, Department of Commerce, Bureau of the Census.

<sup>2</sup> Bureau of Labor Statistics, Construction Statistics Division, Material not published.

<sup>3</sup> Includes all-Negro units.

\* Special Sample Survey of Ten Congested Production Areas, Series CA-2, No. 1, Department of Commerce, Bureau of the Census, 1944.

† Special Census, Series P-SC 183, Department of Commerce, Bureau of the Census, May 1945.



started. And when this demand slackens, racial restrictive covenants, the immediate effect of which is to limit Negro demand for housing, will check operations in spite of the need shown by the data on substandard and overcrowded dwellings contained in the Bureau of the Census Survey in April, 1947, presented above.

#### **IV. JUVENILE DELINQUENCY RESULTS FROM CONGESTION.**

Since there is no question, in the face of the facts outlined above, that Negroes live to a considerable degree, in substandard dwellings and are living in overcrowded homes and neighborhoods, it is in order to examine one of the chief results of such a situation. Crowded dwelling units create conflicts in the home and affect the feeling of security and emotional stability of the children in it. They expose the young to conditions which breed and encourage delinquency.<sup>26</sup> In the face of such a situation—aggravated by substandard housing and a congested neighborhood, such as reflected by the Bureau of the Census statistics here presented—proper parental guidance is impossible.<sup>27</sup> Good citizens cannot be developed under such circumstances.<sup>28</sup> The situation is further straitened by the relatively high rents paid by Negroes, as shown by Robinson, cited above. This drain on family resources causes diversion of funds needed for other physical and cultural purposes. It is a prime factor—along with the stringent housing shortage—of “doubling up.”<sup>29</sup>

The National Conference on Prevention and Control of Juvenile Delinquency has aptly summarized the connection between restrictive covenants and juvenile delinquency:

<sup>26</sup> National Conference on Prevention and Control of Juvenile Delinquency. Report on Housing and Juvenile Delinquency (1946) p. 3. Myrdal, op. cit. p. 373.

<sup>27</sup> Ibid. p. 2.

<sup>28</sup> Ibid. p. 4.

<sup>29</sup> Report on Housing and Juvenile Delinquency, p. 4.

"Housing for minority racial groups, particularly Negroes, is among the worst in the United States. The core of this problem is the lack of land area for normal expansion. The operation of racial restrictive covenants and neighborhood opposition has resulted in residential segregation in dense settlements which virtually destroys any possibility of healthy family development. The creation of sharp dividing lines reverberates throughout the entire community to distort the attitudes and lives of young people of all races."<sup>30</sup>

The following table shows the distribution of juvenile delinquency, by race, in six of the cities covered by the Bureau of the Census surveys which have been presented:

**JUVENILE DELINQUENCY CASES, 1945, DISPOSED OF BY  
COURTS SERVING AREAS WITH POPULATIONS  
OF 100,000 OR MORE.\***

Area	Total Cases	White Offenders	Non-White Offenders	Pctg. Non-White Offenders	Ratio of Negro to Total Population
Wash., D. C. ....	3,202	1,331	1,871	59	24
Detroit, Mich. ....	1,990	1,499	491	25	13
St. Louis, Mo. ....	1,671†	1,069	580	35	15
Tulsa, Okla. ....	1,143	878	265	23	10
Phila., Pa. ....	9,652	5,332	4,320	45	13
Dallas, Texas ....	2,263	1,627	636	28	15

\* Federal Security Agency, Social Security Administration, U. S. Children's Bureau, 11 The Child Supplement, p. 9f.

† Race was not reported in 22 cases.

This table shows clearly that the problem of juvenile delinquency is a serious one. In every instance, the Negro child is a more frequent offender than the comparative number of his race in the community would seem to justify. This is not by any means caused solely by racial restrictive covenants, but the covenants certainly contribute to the differences disclosed by figures in the last two columns.

<sup>30</sup> Ibid. p. 12.

## V. THE BACKGROUND AND EFFECTS OF RACIAL RESTRICTIVE COVENANTS.

In the light of the facts so far presented, it seems desirable to sketch the background of the problem before this Court.

Racial residential segregation is an undemocratic device, as is any type of discrimination because of race, creed, color or national origin. And it is a weapon for purposes of offense only. Myrdal states:

"The sanctions which enforce the rules of segregation and discrimination will also be one-sided in their application. They are applied by the whites to the Negroes, never by the Negroes to the whites. Whites occasionally apply them to other whites who go too far, but the latter are felt to have already lost caste. The laws are written upon the pretext of equality, but are applied only against Negroes."<sup>31</sup>

There are, generally speaking, three causes of racial residential concentrations: poverty, ethnic attachment and enforcement by white people. These are the same factors which operated to segregate foreign immigrants during the latter half of the past century and in the first two decades of the present century. They operate differently, however, in the case of Negroes. Immigrants tended to group together while they adjusted themselves to a strange language and new customs. They lived in congested areas because their economic resources were limited. Because of their poverty and their strange languages and customs, older Americans tended to "keep them in their place." But as the immigrants or their descendants acquired larger incomes and adopted American social customs and the language of the country, they tended to leave the areas they inhabited. In a large measure, enforcement of segregation diminished, and they were able to leave the segregated

<sup>31</sup> Myrdal, *op. cit.*, p. 577.

areas and find new, congenial and healthy surroundings. If Negroes faced the same situation, they would now be more widely scattered. Because of the poverty of a large number of them, there would still be many in congested and substandard areas, but not to the extent shown by the Bureau of the Census surveys. In fact, Negroes are, under present conditions, permanent aliens, and they are made so by racial segregation, largely through the operation of restrictive covenants.<sup>32</sup>

It is often argued that Negroes like to be segregated; that they are happy in their lowly status; and that they do not want equality. One also meets frequently the contention that segregation is necessary to keep the peace between the races.<sup>33</sup> In fact, what segregation does to the bulk of Negroes is to increase their housing costs, to overcrowd them, lower their living standards, and lay them open to exploitation, since their poverty would tend to separate them anyway. The people even more sharply affected by segregation are the middle class and upper class Negroes. If white people did not exert pressure upon them when they had the means and the desire to move from segregated areas and disperse among other Americans, there would be no conflict. As we have seen, segregation is a weapon used solely by whites.<sup>34</sup> Their effects might be avoided if the real object of segregation were merely to keep whites and Negroes apart. But the emphasis is always to keep Negroes out of white neighborhoods. No effort is made to provide Negroes with adequate housing and new areas which they can inhabit.<sup>35</sup>

At present, the best a Negro worker can do to escape slums and blighted areas and still remain in existing city limits is to move into districts where racial covenants are

<sup>32</sup> Myrdal, *op. cit.*, p. 619f.

<sup>33</sup> Ibid, p. 584.

<sup>34</sup> Ibid, p. 625.

<sup>35</sup> Ibid, p. 350.



being broken or waived. New developments, except in the outskirts, are virtually non-existent. As a result, the Negro's—including Negro workers and AFL members—choice is limited to obsolescent dwellings dumped on the market at high prices. In an attempt to meet the heavy charges on the property, lodgers are taken in and houses are broken up into smaller units—and a new blighted area created by people seeking to get away from just such conditions.<sup>36</sup> It is not enough to “protect” white people from Negro “invasion.” Some method must be devised which will allow Negroes with adequate resources to leave the ghettos and to find decent houses in decent neighborhoods. Otherwise, “doubling up,” scandalous housing conditions, and mounting juvenile delinquency will continue.<sup>37</sup> Racial restrictive covenants are an important contributing cause of the failure to provide the necessary outlets for the pressures generated by segregation.<sup>38</sup>

No satisfactory solution of this problem is possible within the existing physical limits of segregated areas. Existing buildings are of limited value as residences. The land, however, is valuable for business use, and the tax rate high. Repair of existing structures or erection of new ones are retarded by the high costs.<sup>39</sup>

Nor is there much hope for relief by dispersion to outlying areas. These are usually unimproved and without adequate municipal utilities or protection services. Furthermore, restrictive racial covenants are an increasingly potent barrier.<sup>40</sup>

Only the abandonment of the restrictive covenant and other practices of segregation will solve the problem. Even

<sup>36</sup> Report on Racial Relations (November, 1946) p. II-C-10.

<sup>37</sup> Myrdal, op. cit., p. 626.

<sup>38</sup> Report on Racial Relations, p. II-C-10.

<sup>39</sup> C. S. Johnson. “Patterns of Negro Segregation,” (New York, 1943, p. 10).

<sup>40</sup> Report on Racial Relations, p. II-C-11.



if possible planning to meet the needs of minority groups is undertaken—something which is certainly not being done adequately—housing segregation simply serves as a means to expose those groups to other forms of discrimination, particularly on the part of officials.<sup>41</sup> Segregation in schools, hospitals and other public places is an inevitable result of residential segregation even if not the result of conscious policy.<sup>42</sup> If prejudice on the part of officials exists, discrimination may be practiced and considerable harm done to Negroes without direct effect upon whites.<sup>43</sup>

One of the important forces operating to maintain residential segregation of Negro workers is informal social pressure. In many cases, whites will not sell or rent to Negroes, and they will meet any new Negro residents in their community with social and—in extreme cases—physical hostility. The pressure of need often causes Negroes to move to new areas in spite of this opposition.<sup>44</sup> The first means devised for supporting informal pressures after the Reconstruction Era was the zoning regulation, in many and devious forms. This Court, in *Buchanan v. Worley*, 245 U. S. 60; *Harmon v. Tyler*, 273 U. S. 668, and *City of Richmond v. Deans*, 281 U. S. 704, has barred the use of this method, on the ground that the Fourteenth Amendment deprives the State of the power to enact and enforce through its executives regulations which make distinctions between citizens based on color. In order to evade the effects of the rulings of this Court, racial restrictive covenants were devised. They now constitute the chief bulwarks to support informal social pressure where it may weaken.<sup>45</sup>

<sup>41</sup> Myrdal, *op. cit.* p. 618.

<sup>42</sup> *Ibid.* p. 601f. Johnson, *op. cit.* p. 8.

<sup>43</sup> *Ibid.* p. 618.

<sup>44</sup> *Ibid.* p. 622.

<sup>45</sup> Report of the President's Committee on Civil Rights. "To Secure These Rights," p. 91.

In actual effect, the racial restrictive covenant has been a successful instrument to accomplish all the purposes of the zoning regulations which this Court held to be beyond the powers of the States.<sup>46</sup> But its effectiveness rests upon the judicial enforcement by State courts—as much the instrumentality of the State as the legislative and the executive—of the agreements made between individuals who have and exercise no responsibility to the State for the consequences of their acts.<sup>47</sup>

<sup>46</sup> M. T. Van Hecke. "Zoning Ordinances and Restrictions in Deeds," 37 Yale L. J. 413 (Feb. 1928). Cited in R. Sterner, "The Negro's Share" (New York, 1943, p. 208).

<sup>47</sup> Report of the President's Committee on Civil Rights, p. 69. Johnson, op. cit., p. 177.

## CONCLUSION

In order to make possible the elimination of the undesirable conditions which are aggravated by racial restrictive covenants, and which have been outlined in this brief, the American Federation of Labor urges that this Court deny to the State and Federal judiciary the power to enforce racial restrictive covenants on the ground that they are in purpose and effect racial zoning ordinances. It is clear that they invariably operate to close to occupancy by Negroes whole sections of cities and are useless if they do not effectuate the economic and social purposes of those who perpetuate their execution, at the expense of the entire community. A State, through its courts, cannot, consistently with the Fourteenth Amendment, enforce racial zoning ordinances whether such ordinances are inaugurated by act of the state legislature or by private individuals."

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<sup>48</sup> Brief in these cases submitted by American Civil Liberties Union as Amicus Curiae.